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EDITOR'S NOTE

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lo. 84-1725-CFX
tatus: GRANTED

Title: United States, Petitioner
v.
City of Fulton, et al.

ocketed:
lay 2, 1985

Court: United States Court of Appeals for the Federal Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Wheatley Jr.,Charles F.

ntry	Date	Note	Proceedings and Orders
1	Mar 29 1985		Application for extension of time to file petition and order granting same until May 9, 1985 (Chief Justice, April 1, 1985).
2	May 2 1985	G	Petition for writ of certiorari filed.
3	May 31 1985		Brief amicus curiae of Sam Rayburn Dam Elec. Coop. filed.
4	Jun 4 1985		Brief of respondents City of Fulton, et al. in opposition filed.
5	Jun 11 1985		DISTRIBUTED. June 27, 1985
6	Jun 19 1985	X	Reply brief of petitioner United States filed.
8	Jul 1 1985		Petition GRANTED.
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10	Aug 1 1985		Order extending time to file brief of petitioner on the merits until September 6, 1985.
11	Aug 19 1985		Order further extending time to file brief of petitioner on the merits until September 20, 1985.
12	Aug 2 1985	G	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
13	Sep 18 1985		Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED.
14	Sep 23 1985		Brief of petitioner United States filed.
15	Oct 23 1985		Brief amicus curiae of respondent Sam Rayburn Dam Electric Cooperative filed.
16	Oct 23 1985		Brief of respondents City of Fulton, et al. filed.
17	Nov 1 1985		Record filed.
18	Nov 21 1985		SET FOR ARGUMENT, Tuesday, January 21, 1986. (1st case).
19	Nov 26 1985		CIRCULATED.
20	Dec 16 1985		Record filed.
21	Jan 14 1986	X	Reply brief of petitioner United States filed.
22	Jan 21 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

84-1725

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF FULTON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
ANDREW J. PINCUS
Assistant to the Solicitor General
DAVID M. COHEN
JOHN W. SHOWALTER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

QUESTION PRESENTED

Whether the Secretary of Energy may place into effect on an interim basis an increase in the rate charged for electricity generated by federal hydroelectric projects, subject to final approval of the rate increase by the Federal Energy Regulatory Commission.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the cities of Lamar, Missouri, and Thayer, Missouri, were appellees in the court of appeals and are respondents in this Court. The city of Piggott, Arkansas, reached a settlement with the government in the Claims Court, and accordingly was not an appellee in the court of appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF FULTON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 751 F.2d 1255. The prior opinion of the Court of Claims (App., *infra*, 5a-18a) is reported at 680 F.2d 115. The order of the Claims Court (App., *infra*, 19a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 23a) was entered on January 9, 1985. By order dated April 1, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 9, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Flood Control Act of 1944, the Department of Energy Organization Act, and Department of Energy *Delegation Order No. 0204-33* are set forth in the appendix to this petition (App., *infra*, 67a-71a).

STATEMENT

1. The federal government operates more than 100 hydroelectric dams on the nation's waterways. The electricity generated by these projects is sold to the public by five regional power marketing administrations (PMAs): the Southwestern Power Administration, the Southeastern Power Administration, the Bonneville Power Administration, the Western Area Power Administration, and the Alaska Power Administration.[1] The PMAs together provide approximately 6% of the nation's electric power, serving wholesale customers in 33 states.

This case concerns sales of power by the Southwestern Power Administration (SWPA), which markets the electricity produced by dams operated by the Army Corps of Engineers in Arkansas, Missouri, Oklahoma, and Texas. The SWPA's authority to sell power rests upon Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, which authorizes the sale of electricity generated "at reservoir projects under the control of the Department of the Army * * * not required in the operation of such projects." See also 10 Fed. Reg. 14527 (1945) (order designating the SWPA as marketing agent for this electricity). The statute provides for the sale of this power at "the lowest possible rates to

[1] Power produced at projects located in the Tennessee Valley is marketed by the Tennessee Valley Authority, which differs from the PMAs in that it has sole control over the rates it charges for power (16 U.S.C. 831i, 831m).

consumers consistent with sound business principles" and states that rates should be set with "regard to the recovery * * * of the cost of producing and transmitting" the electricity, "including the amortization of the capital investment allocated to power over a reasonable period of years" (16 U.S.C. 825s).

The statute as enacted authorized the Secretary of the Interior to propose the rates to be charged for electricity, which would "become effective upon confirmation and approval by the Federal Power Commission" (16 U.S.C. (1976 ed.) 825s). This arrangement for setting the rates for power sold under the Flood Control Act was altered in 1977 by the Department of Energy Organization Act (DOE Act), 42 U.S.C. 7101 *et seq.* First, the DOE Act transferred the Secretary of the Interior's rate-proposing function to the Secretary of Energy (42 U.S.C. 7152(a)(1)).[2] Second, the statute abolished the Federal Power Commission and stated that "[e]xcept as provided in subchapter IV of this chapter, there are transferred to, and vested in, the Secretary [of Energy] the function of the Federal Power Commission" (42 U.S.C. 7151 (b)). Subchapter IV of the DOE Act, which consists of 42 U.S.C. 7171-7177, contains no reference to the Federal Power Commission's authority under the Flood Control Act to approve rates for hydroelectric power generated by federal projects.

The Secretary of Energy concluded that the DOE Act vested him with authority to set the rates for electricity sold by the PMAs. He delegated to the Administrator of the Economic Regulatory Administration within the Department of Energy "the authority * * * to confirm and approve power or transmission rates of federal power marketing agencies" (*Delegation Order No. 0204-4*, para. 15, 42 Fed. Reg. 60726, 60727 (1977)).

[2] The Act also transferred the SWPA and the other PMAs from the Department of the Interior to the Department of Energy (42 U.S.C. 7152(a)).

The Secretary revised this procedure in an order that became effective on January 1, 1979 (*Delegation Order No. 0204-33*, 43 Fed. Reg. 60636 (1978)). He delegated to the Assistant Secretary for Resource Applications, acting through the PMA Administrators, the authority to develop power rates, and to the Federal Energy Regulatory Commission (FERC) the authority to confirm and approve rates on a final basis (*id.* at 60636). The Assistant Secretary for Resource Applications also was empowered (*id.* at 60636-60637)

> to confirm, approve, and place in effect such rates on an interim basis, for such period or periods as he may provide, subject to refund with interest as determined by the Federal Energy Regulatory Commission * * *. No rate developed by the Assistant Secretary shall become effective on a final basis unless and until such rate is confirmed and approved by the Federal Energy Regulatory Commission * * *.

Thus, the delegation order authorized the Assistant Secretary to place a rate into effect on an interim basis pending final approval of the rate by the FERC.[3]

2. Respondents are three cities that purchase power from the SWPA—Fulton, Missouri; Lamar, Missouri; and Thayer, Missouri.[4] Each respondent's contract with the SWPA includes a clause concerning rate changes that essentially incorporates the pertinent language of the Flood Control Act. The clauses provide that new rates may be imposed with the "confirmation and approval of the Federal Power Commission" and that such rates "shall * * * become effective * * * in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval." C.A. App. 93, 127, 157.

[3] The most recent delegation order modifies this allocation slightly by authorizing the PMA Administrators to submit rates to the FERC for final approval and by authorizing the Deputy Secretary of Energy to place rates into effect on an interim basis. *Delegation Order No. 0204-108*, 48 Fed. Reg. 55664 (1983).

[4] The city of Piggot, Arkansas, originally was a plaintiff in this action, but its claims were settled in the Claims Court. See *City of Fulton* v. *United States*, No. 509-80C (Cl. Ct. Apr. 6, 1984).

In April 1978, the SWPA issued a notice relating to a proposed rate increase (43 Fed. Reg. 16545-16546). The notice stated that the SWPA had prepared a study of its progress in repaying the government's investment in generation facilities, and had concluded "that the legal requirement to repay the power investment with interest is not being met" (*id.* at 16546). The SWPA found that additional revenues of $20 million, an increase of 42% over current revenues, were needed to meet its statutory obligation to cover costs and repay the government's investment. The notice stated that the SWPA had prepared a tentative rate schedule that was available to interested parties. It solicited written comments and represented that a forum would be held for oral presentations. *Ibid.*[5]

On March 1, 1979, the Assistant Secretary of Energy for Resource Applications issued an order confirming and approving increased power rates for the SWPA and placing the new rates into effect on an interim basis as of April 1, 1979. 44 Fed. Reg. 13068. The Assistant Secretary observed that the SWPA had not increased its general rates since 1957 (*id.* at 13069). He stated that the SWPA's repayment study had been revised on the basis of the public comments and that a revenue increase of 33%, as opposed to 42%, was required to meet the SWPA's statutory repayment obligation. The Assistant Secretary ordered the new rates submitted to the FERC for final approval (*id.* at 13073).[6] The FERC

[5] The SWPA eventually held two forums for such presentations. 44 Fed. Reg. 13069 (1979).

[6] The Assistant Secretary initially approved the rate increase for 12 months, but subsequently extended the interim increase un-

at first disapproved the new rates because they were too low (see 46 Fed. Reg. 30877 (1981)). It approved the rates in January 1982 after the SWPA had submitted additional data. 47 Fed. Reg. 4562; see also 47 Fed. Reg. 16857 (denying rehearing and confirming approval of rate increase).

3. Respondents filed this action in the Court of Claims seeking to recover the money paid pursuant to the interim rate increase between April 1979 and January 1982.[7] They argued that interim rate increases were not permitted under either the Flood Control Act or their contracts with the SWPA. The government contended that the DOE Act authorized the Secretary of Energy to confirm rates under the Flood Control Act, that the decision to place into effect an interim rate was a proper exercise of this authority, and that respondents' contracts permitted the imposition of the interim rate increase.

The Court of Claims granted respondents' motion for summary judgment on the issue of liability (App., *infra*, 5a-18a). It rejected the government's argument that the rate-confirming function of the FPC had been transferred to the Secretary of Energy by the DOE Act, observing that "many of the rate approval functions of the FPC were transferred to the FERC in subchapter IV [of the DOE Act], such administrative review to be exercised *independently* of the Secretary of Energy" (App., *infra*, 10a (emphasis in original)). The court also noted that the FPC's authority under the Flood Control Act was not listed in another provi-

til the rate was approved by the FERC. See 45 Fed. Reg. 19303 (1980); 46 Fed. Reg. 19849 (1981).

[7] Respondents invoked the Court of Claims' jurisdiction under 28 U.S.C. (Supp. III 1979) 1491, which provided that the Court of Claims had "jurisdiction to render judgment upon any claim against the United States founded * * * upon any express * * * contract with the United States."

sion transferring authority to the Secretary (*id.* at 10a-11a). Finally, the court stated that Section 501(a)(1) of the DOE Act, 42 U.S.C. 7191(a)(1), preserves preexisting administrative procedure requirements and concluded that the requirement of "FPC confirmation and approval * * * [prior to implementation of a rate increase] continues to apply to administrative actions under the Flood Control Act" (App., *infra*, 12a).

The Court of Claims also found that "the terms of the contracts clearly contemplate an increase in rate charges only after 'confirmation and approval' by the FPC. No provision for interim increases even exists in the contracts" (App., *infra*, 13a). It noted that decisions of this Court prohibit unilateral rate increases in violation of the express terms of utility contracts. *Id.* at 14a & n.15, citing *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The court held that these cases "dictate[ ] that the express contracts between plaintiffs and the SWPA, which contracts provide procedural safeguards prior to initiation of a rate increase, cannot be unilaterally modified by administrative fiat" (App., *infra*, 14a).

Finally, the Court of Claims asserted that past administrative practice supported its conclusion that interim rate increases were not authorized under the statute or contracts. It distinguished three interim rate increases approved by the FPC on the ground that they involved PMAs other than the SWPA (App., *infra*, 14a-16a). The court concluded that "the rate increase ordered by the Assistant Secretary of Energy on an interim basis violated that provision of the contracts between [respondents] and the Government which required 'confirmation and approval' by the Federal Power Commission" (*id.* at 18a). It remanded the action to its trial division to determine the amount of damages (*ibid.*).

While this case was pending in the trial division of the Court of Claims, that court ceased to exist pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 *et seq.* The newly-created Claims Court assumed jurisdiction over the case. See *id.* § 403(d), 96 Stat. 58. The parties agreed upon the amount of damages, the Claims Court entered a final judgment in the amount of approximately $950,000 (see App., *infra*, 19a-22a), and the United States appealed to the Court of Appeals for the Federal Circuit (see 28 U.S.C. 1295(a)(3)).

The court of appeals affirmed (App., *infra*, 1a-4a). The court rejected respondents' claim that because the Court of Claims previously had issued a decision in the case the court of appeals lacked jurisdiction to review the judgment of the Claims Court (*id.* at 2a). The court of appeals concluded, however, that the prior decision of the Court of Claims regarding the Secretary's rate-setting authority constituted the law of the case (*id.* at 2a-3a).[8] It declined to overrule that decision because it was "convinced the Court of Claims reached the correct result: the interim rate increase was a breach of contract" (*id.* at 3a (footnote omitted)).

REASONS FOR GRANTING THE PETITION

The decision below conflicts with a decision of the Fifth Circuit that upheld the very rate increase invalidated by the Federal Circuit in this case. The result reached by the Federal Circuit thwarts the intent of Congress by imposing unjustified restrictions upon the authority of the Secretary of Energy to set the rates for hydroelectric power sold by the government. More-

[8] Recognizing that the Court of Claims' decision in *City of Fulton* constituted the law of the Federal Circuit (see *Capital Electric Co.* v. *United States*, 729 F.2d 743, 746 (Fed. Cir. 1984)), the government sought an initial en banc hearing in the court of appeals, but that request was denied (App., *infra*, 3a-4a).

over, it creates a significant obstacle to fulfilling Congress's repeated directive that these rates generate revenues sufficient to cover the cost of producing hydroelectric power. Finally, substantial amounts of money have been collected pursuant to interim rate increases, and the rule adopted in this case by the Federal Circuit could subject the government to monetary liability in excess of $500 million in suits for refunds brought by other power customers. Review by this Court therefore is plainly warranted.

1. The Federal Circuit's determination that the Secretary cannot impose interim increases in electric power rates squarely conflicts with the Fifth Circuit's decision in *United States* v. *Tex-La Electric Cooperative, Inc. (Tex-La)*, 693 F.2d 392 (5th Cir. 1982).[9] As we discuss below, the *Tex-La* court thoroughly analyzed the relevant statutory provisions and legislative history and concluded that the Secretary has full authority to place a rate increase into effect on an interim basis. See also *Montana Power Co.* v. *Edwards*, 531 F. Supp. 8 (D. Ore. 1981) (upholding Bonneville Power Administration interim rate increase); *Pacific Power & Light Co.* v. *Duncan*, 499 F. Supp. 672 (D. Ore. 1980) (same). In reaching this result, the Fifth Circuit expressly criticized the opinion of the Court of Claims in the present case (see App., *infra*, 30a-31a, 59a).[10] The Federal Circuit, in turn, rested its support of the Court of Claims' decision solely upon a district court decision that was vacated pursuant to the Fifth Circuit's decision in *Tex-La* (App., *infra*, 3a n.*). In reaffirming the decision of the Court of Claims, the Federal Circuit in-

[9] We have reprinted the Fifth Circuit's opinion in the appendix to this petition (see App., *infra*, 24a-66a).

[10] The Court of Claims relied upon district court decisions that were reversed by the Fifth Circuit in *Tex-La* (App., *infra*, 17a-18a & n.28).

explicably failed even to address the Fifth Circuit's criticism of the Court of Claims' decision.[11]

2. Moreover, the decisions of the Federal Circuit and the Court of Claims[12] are contrary to both the plain language of the Department of Energy Organization Act and Congress's purpose in enacting that statute.

a. Prior to the creation of the Department of Energy, the authority to set rates for sales of hydroelectric power under the Flood Control Act was shared by the Secretary of the Interior and the Federal Power Commission (FPC). Section 5 of the Flood Control Act, 16 U.S.C. (1976 ed.) 825s, authorized the Secretary of the Interior to sell power "at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission." The Secretary would propose a rate and the FPC would act upon the Secretary's proposal after providing interested parties with notice and an opportunity to comment and, in some circumstances, an oral hearing. See 18 C.F.R. 2.1(a)(1)(vi)(A) (1976); *In re United States Department of the Interior, Southwestern Power Administration*, 56 F.P.C. 795, 799 (1976) (public notice and opportunity to comment); *In re United States Department of the Interior, Bonneville Power Administration*, 58 F.P.C. 2498, 2500 (1977) (formal hearing ordered).

The Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, reallocated responsibility for setting rates for hydroelectric power generated by federal

[11] The government's brief in the court of appeals pointed out the conflict between the decision of the Court of Claims and the subsequent Fifth Circuit decision and urged the court of appeals to reconsider the result reached by the Court of Claims.

[12] This Court's jurisdiction extends to review of the prior decision of the Court of Claims. See *United States* v. *Clark*, 445 U.S. 23, 25-26 n.2 (1980); see also Stern & Gressman, *Supreme Court Practice* §§ 2.2, 2.18 (5th ed. 1978).

projects. Section 302(a) of the DOE Act, 42 U.S.C. 7152(a), transferred to the Secretary of Energy all of the relevant authority of the Secretary of the Interior, and provided that this authority "shall be exercised by the Secretary, acting by and through" the administrators of the PMAs. The statute abolished the Federal Power Commission and created the Federal Energy Regulatory Commission (FERC) (42 U.S.C. 7151(b), 7171, 7172). The FERC was vested with specific categories of authority formerly exercised by the FPC (see 42 U.S.C. 7172(a)), and the remainder of the FPC's responsibilities were transferred to the Secretary (42 U.S.C. 7151(b)). Since the FPC's authority over the rates charged for federal hydroelectric power was not transferred to the FERC, the plain language of the statute makes clear that this authority now resides in the Secretary.

The Court of Claims reached a contrary conclusion on the basis of its observation that "many of the rate approval functions of the FPC were transferred to the FERC" (App., *infra*, 10a). The Fifth Circuit in *Tex-La* correctly pointed out that the Court of Claims simply "misread[ ] the statute" (App., *infra*, 30a). The *Tex-La* court noted that "[a]t a first reading, Title IV of the DOE Act appears to transfer *all* of the hydroelectric power regulating functions of the Federal Power Commission to the new FERC," but that "a closer reading" reveals that the Flood Control Act authority was not transferred to the FERC (*id.* at 29a-30a (emphasis in original)). Thus, "[t]he inevitable conclusion, and the one that nearly everyone has drawn, is that the Secretary of Energy * * * exercises the confirmation and approval function of the old Federal Power Commission" (*id.* at 30a).[13]

[13] The FERC itself has acknowledged that the DOE Act vested the Secretary with sole authority over these rates. See 47 Fed. Reg. 16857, 16858 (1982).

The Court of Claims also based its view of the DOE Act upon Section 501(a)(1), 42 U.S.C. 7191(a), which provides that the DOE Act does not abrogate "administrative procedure requirements" imposed by other statutes. The court concluded (App., *infra*, 12a) that "FPC confirmation and approval [prior to implementation of a rate increase] * * * constitutes an additional 'administrative procedure requirement' which * * * continues to apply to administrative actions under the Flood Control Act."

This interpretation of Section 501(a)(1) cannot be sustained. The basic purpose of the DOE Act was to reduce the fragmentation of decisionmaking with regard to energy issues. Congress found that "responsibility for energy policy, regulation, and research and development is fragmented in many departments and agencies and thus does not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs" (42 U.S.C. 7111(4)). It concluded that "formulation and implementation of a national energy program requires the integration of major Federal energy functions into a single department in the executive branch" (42 U.S.C. 7111(5)), and passed the DOE Act in order to "achieve, through the Department [of Energy], effective management of energy functions of the Federal Government" (42 U.S.C. 7112(2)). The Court of Claims' reading of Section 501 (a)(1) would nullify Congress's efforts to achieve this goal because it would continue to require bifurcated decisionmaking where Congress sought to consolidate authority in order to eliminate inefficiency.

The Fifth Circuit acknowledged in *Tex-La* that the unification of all ratemaking authority in the Secretary conflicted to some extent with the bifurcated plan of the Flood Control Act. However, it recognized that:

> In the eyes of Congress, divisions of authority—here, between the Secretary of the Interior and the Federal Power Commission—were a positive evil, something which the statute was designed to correct. Congress did not, in other words, unite the federal hydroelectric ratemaking authority of the Secretary of the Interior and the Federal Power Commission in the person of the Secretary of Energy by mistake. On the contrary, Congress seems to have done everything within its power to indicate that the unification was accomplished on *purpose*.

App., *infra*, 44a (emphasis in original); see also *id.* at 44a-49a. Thus, Section 501(a)(1) must be read as preserving only "the *substance* of [another statute's] technical procedural requirements, and not * * * the identity of the agencies responsible for implementing them." *Id.* at 47a (emphasis in original); see also S. Conf. Rep. 95-367, 95th Cong., 1st Sess. 81 (1977). The necessary conclusion is that the DOE Act endows the Secretary of Energy with complete authority over the rates for power sold pursuant to the Flood Control Act.

b. The Secretary of Energy chose not to exercise this authority himself and issued an order dividing the rate authority into several parts. See *Delegation Order No. 0204-33*, 43 Fed. Reg. 60636 (1978). Under this order, the PMA Administrators developed rates and an Assistant Secretary reviewed the rates and proposed them to the FERC, which was authorized to confirm the rates. The Assistant Secretary could place the proposed rates into effect on an interim basis while the matter was being considered by the FERC, but customers' payments pursuant to an interim rate had to be refunded with interest if a lower rate subsequently was approved by the FERC. See pages 3-4, *supra*.

The Court of Claims incorrectly concluded that the Secretary lacked the authority to provide for the imposition of interim rate increases. The past administrative practice of the FPC and the consolidation of authority effected by the DOE Act compel the conclusion that the Secretary may impose interim increases in PMA rates.

Indeed, as the *Tex-La* court observed, under the DOE Act "the Secretary of Energy arguably could have done almost anything to implement rates, so long as he complied with the 'notice and comment' provisions of the Administrative Procedure Act" (App., *infra*, 42a (footnote omitted)).

The Flood Control Act by its terms does not bar interim rate increases, and prior to the enactment of the DOE Act the FPC several times exercised its authority under the Flood Control Act to approve interim rates of the type challenged here. The FPC authorized PMAs to implement a rate increase on an interim basis with the proviso that the funds remitted pursuant to the increase would be returned to customers if the rate increase was not approved. In *In re United States Department of the Interior, Southeastern Power Administration*, 54 F.P.C. 3 (1975), for example, the FPC reviewed a proposed rate increase pursuant to the Flood Control Act and concluded that a hearing was necessary in order to evaluate the proposed rate. It permitted the rate to go into effect "upon the condition that SEPA agrees to refund or credit to its customers such portions of the proposed rates and charges as may result from Commission disapproval" (*id.* at 6).[14]

The Commission took similar action with respect to two rate increases sought by the Bonneville Power Administration. See *In re United States Department of the Interior, Bonneville Power Administration*, 58 F.P.C.

[14] The Court of Claims noted (App., *infra*, 15a-16a) that the Department of the Interior protested this action. However, the Interior Department's objection was based on its view that the FPC could only approve or reject rates submitted by the Secretary of the Interior. The Secretary had not proposed an interim rate in that case. See generally C.A. App. 356-399 (Interior Department filings). Under the DOE Act, by contrast, the Secretary of Energy is authorized both to propose *and* confirm rates. The Secretary's delegation order therefore can be viewed as authorizing both the proposal and confirmation of an interim rate.

2498, 2502 (1977); *In re United States Department of the Interior, Bonneville Power Administration*, 52 F.P.C. 1912, 1919 (1974). Although these cases were decided under the Bonneville Project Act rather than the Flood Control Act, the two statutes contain identical provisions relating to rate increases. Compare 16 U.S.C. 825s with 16 U.S.C. 832e, 838g. This exercise of interim rate authority by the FPC mandates the conclusion that the Secretary, who received all of the FPC's authority, is empowered to impose interim rates.

The consolidation of rate authority effected by the DOE Act certainly could not have diminished the authority transferred from the FPC to the Secretary. In fact, in a series of decisions concerning the authority of regulatory bodies to establish interim rates, this Court has held that plenary authority over utility rates, such as that possessed by the Secretary here, carries with it the power to impose interim rates. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654-657 (1978); *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583-585 (1942); *The New England Divisions Case*, 261 U.S. 184 (1923). Thus, the Secretary's plenary authority over rates provides additional support for the conclusion that the Secretary can impose interim rate increases under the Flood Control Act.[15]

[15] The Court of Claims stated (App., *infra*, 11a n.10) that this principle was limited to the Natural Gas Act, but *Trans Alaska Pipeline Rate Cases*, *supra*, concerned the authority of the Interstate Commerce Commission and therefore makes clear that the rule is a general one. In addition, state statutes endowing a regulatory body with plenary authority over rates consistently have been interpreted to authorize the imposition of interim rates. See, *e.g.*, *Colorado Municipal League* v. *Public Utilities Commission*, 197 Colo. 106, 116-117, 591 P.2d 577, 584 (1979); *In re Kauai Electric Division*, 60 Haw. 166, 178-181, 590 P.2d 524, 534-535 (1978); *Grindstone Butte Mutual Canal Co.* v. *Idaho Power Co.*, 98 Idaho 860, 864, 574 P.2d 902, 906 (1978); *Kansas-Nebraska Natural Gas*

As the Fifth Circuit observed, a contrary conclusion would produce "a most unlikely result" (App., *infra*, 66a). The Secretary of Energy could have dispensed completely with any review by the FERC. Therefore, if the Secretary's decision to allow the Assistant Secretary to impose interim rates and permit final review by the FERC were invalidated, it "would have been struck down because it gave litigants *too much* 'process' by giving them one last, truly independent review before the FERC. * ** [W]e think that at the very least it requires searching study and careful consideration before we strike down a scheme that gives the complainants *too much* process" (App., *infra*, 66a (emphasis in original)).

Moreover, because the Secretary is charged with authority over hydroelectric rates under the DOE Act, his determination that the statute authorizes the imposition of interim rates is entitled to deference. As this Court recently noted, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resource Defense Council*, No. 82-1005 (June 25, 1984), slip op. 5 (footnote omitted); see also *id.* at 6-7 & n.14; *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, No. 82-1071 (June 5, 1984), slip op. 8; *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982). In view of the previous exercise of interim rate authority by the FPC and settled legal doctrine concerning the imposition of interim utility rates, the Secretary's interpretation of the statute plainly satisfies this standard.

c. The Secretary is not barred from imposing an interim increase in the rates paid by respondents because

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Co. v. *State Corporation Commission*, 217 Kan. 604, 613-615, 538 P.2d 702, 711 (1975); *Chesapeake & Potomac Telephone Co.* v. *Public Service Commission*, 330 A.2d 236 (D.C. 1974).

respondents' contracts incorporate the language of the Flood Control Act relating to rate changes.

The contracts provide that new rates will be effective "in accordance with and on the effective date specified in the order of the Federal Power Commission containing * * * confirmation and approval" (see page 5, *supra*). It seems clear, as the Fifth Circuit concluded in *Tex-La*, that these provisions "track, and in effect incorporate by reference, the language of Section 5 of the Flood Control Act." App., *infra*, 50a; see also *id.* at 13a (Court of Claims observed in the present case that "the very language of the statute itself is incorporated into the contract terms"). Because the contract provisions incorporate the language of the statute, they should be interpreted in the same manner as the statute. The *Tex-La* court properly held (App., *infra*, 50a) that "[s]ince the procedural requirements of section 5 have been altered by the DOE Act, the * * * contracts should be read accordingly, i.e., as permitting the imposition of interim rates, subject to refund with interest, by the Secretary of Energy." In addition, the Assistant Secretary's order satisfied the contract's requirement of "confirmation and approval" of new rates because it expressly "confirm[ed] and approve[d]" the interim rates (44 Fed. Reg. 13068, 13073 (1979)).[16]

It is possible to interpret the contract provisions as a guarantee that respondents would receive certain procedural protections in connection with the imposition of a rate increase. Thus, the Court of Claims stated (App., *infra*, 14a), that the "contracts provide procedural safeguards prior to initiation of a rate increase, [and] cannot be unilaterally modified by administrative fiat." Even if this interpretation of the contracts were cor-

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[16] The Court of Claims' reference (App., *infra*, 16a) to "final" approval of a rate increase prior to its implementation is puzzling in light of the fact that the term "final" does not appear in the relevant provisions of respondents' contracts.

rect, it would not bar the interim rate increase because respondents received the full benefit of administrative procedures. The SWPA requested comments and held meetings with interested parties prior to submitting its rate request. See page 5, *supra*. Moreover, respondents had an opportunity to challenge the rate increase in the FERC proceeding. Thus, in contrast to the procedures prior to the passage of the DOE Act, under which customers could only contest a proposed rate increase before the FPC, respondents had two opportunities to be heard regarding the rate increase at issue here. As the Fifth Circuit noted, these procedures "fully met the 'process' concerns of those who originally designed and enacted the bifurcated ratemaking procedure set out in section 5 of the Flood Control Act" (App., *infra*, 57a).[17]

Indeed, in view of the provision for a refund of the interim rate increase with interest in the event of disapproval by the FERC, it is difficult to see how respondents have been injured in any manner by the present procedure. All that has happened is that respondents no longer can benefit from any regulatory delay attendant to a rate increase. This fact does not constitute a sufficient justification for invalidating the Secretary's delegation order or interpreting the contracts to bar interim rate increases.

3. The issue presented in this case is of substantial importance to the government's hydroelectric power program. Congress endowed the Secretary of Energy

[17] This result does not conflict with this Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Those decisions relate only to the imposition of rate increases that are prohibited by the express terms of the customer's contract. See *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 110 (1958). As we have shown, the interim rate increase was not barred under respondents' contracts.

with plenary authority over hydroelectric rates, but the decisions below undercut that authority in direct contravention of the language and purpose of the DOE Act.[18]

In addition, the decisions of the courts below thwart Congress's goal of recovering from the PMA's customers all of the costs of generating hydroelectric power. The statutes governing the sale of hydroelectric power direct that rates charged to purchasers of this power be set at levels sufficient to cover the cost of generating the electricity. See 16 U.S.C. 825s, 832f, 838g; 43 U.S.C. 485h(c). It has proved difficult for the SWPA to meet this goal. See *In re U.S. Department of the Interior, Southwestern Power Administration*, 58 F.P.C. 2170, 2173 (1977) ("SWPA's existing system rates now fail by at least $9,000,000 per year to generate the revenue necessary to repay the costs of producing and transmitting the system projects' power"); *In re United States Department of the Interior, Southwestern Power Administration*, 43 F.P.C. 804, 807 (1970) (after 26 years of operations, the SWPA's revenues failed to cover $30 million in interest due on the government's investment in power facilities).

Congress repeatedly has emphasized the importance of timely recovery of costs:

> [T]he Committee expects the Department to move promptly in establishing the new rates for Southwestern Power Administration, and other Administrations as necessary, to recover costs and meet repayment requirements on a current basis. The Committee intends to follow the progress of the Department actions closely so as to assure the necessary attention to this matter.

[18] The practical effect of the decisions below is to bar interim rate increases nationwide, even within the Fifth Circuit, because any customer could sue for a refund in the Claims Court and thereby rely upon the decisions in the present case.

H.R. Rep. 95-1247, 95th Cong., 2d Sess. 59 (1978); S. Rep. 95-1069, 95th Cong., 2d Sess. 53 (1978); see also H.R. Rep. 96-243, 96th Cong., 1st Sess. 69 (1979); *Energy and Water Development Appropriations For 1980: Hearings Before the Subcomm. on Energy and Water Development of the House Comm. on Appropriations*, 96th Cong., 1st Sess. 2995-2998 (1979).[19]

Interim rates often are necessary in order to ensure that a rate increase will generate revenues sufficient to cover costs. The determination that a designated rate will generate sufficient revenues is based upon the assumption that the rate will be placed into effect on a specified date. If the regulatory process takes longer than expected, and the scheduled implementation of the rate increase is delayed, the revenue generated by the new rate will be reduced. Interim rates prevent this problem from arising because they permit the implementation of a new rate on schedule, subject to refunds with interest if the rate does not receive final approval.

The potentially serious effects of regulatory delay, and the corresponding importance of interim rates, are demonstrated by the recent use of interim rate increases by the PMAs. In this case, for example, the FERC did not approve the rate increase until 33 months after it was proposed. If the rate had not been imposed on an interim basis, the SWPA would have lost $46 million in revenue. Overall, the PMAs have imposed interim rates on 42 occasions, generating approximately $2.4 billion in revenue.[20] If the Secretary

[19] The Department of Energy also has recognized the importance of this goal. The procedures for power marketing administrations established by the Department provide that a power system's rates are adequate only if the projected revenues are sufficient to cover both annual costs and the repayment of the federal investment in the hydroelectric generating plants. Department of Energy Order RA 6120.2, para. 12 (Sept. 20, 1979).

[20] This data was supplied to us by the Department of Energy.

lacked the authority to impose interim rates, this revenue would have been lost, and the burden of meeting the PMA's costs would have been shifted to the taxpayers.

Finally, the decision below casts doubt upon the validity of many of the interim rate increases placed into effect by other PMAs using the same procedures followed by the SWPA. The Fifth Circuit observed in *Tex-La* that in the event of a decision invalidating the interim rate increase "the power customers who have already paid the interim rates of the several PMAs (which is almost all customers) would create a veritable stampede in their rush to get their money back from the Court of Claims (now the Court of Appeals for the Federal Circuit)" (App., *infra*, 28a n.5). The Department of Energy estimates that more than $500 million might be subject to refund if the Claims Court and the Federal Circuit continue to adhere to the rationale of this case. Review by this Court is essential to eliminate this improper limitation upon the Secretary's rate-setting authority and to prevent the disruption of the hydroelectric power program that would result from these unjustified refunds.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
ANDREW J. PINCUS
Assistant to the Solicitor General
DAVID M. COHEN
JOHN W. SHOWALTER
Attorneys

MAY 1985

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 84-913

CITY OF FULTON, CITY OF LAMAR, CITY OF THAYER, CITY OF PIGGOTT, APPELLEES,

v.

THE UNITED STATES, APPELLANT

DECIDED: JANUARY 9, 1985

BEFORE DAVIS, BALDWIN, and BISSELL, *Circuit Judges*.

PER CURIAM.

This is an appeal from a judgment of the United States Claims Court to the extent that the judgment failed to grant the appellant relief on the issue of liability. The judgment was in accord with the prior decision of the Court of Claims that granted summary judgment for the appellees on that issue. *City of Fulton* v. *United States*, 680 F.2d 115 (Ct. Cl. 1982). In this appeal appellant seeks to relitigate the identical issue that that decision resolved against it. Since that prior decision is the law of the case, we affirm.

BACKGROUND

City of Fulton, et al., brought an action in the Court of Claims contending that the government breached its contract for the sale of hydroelectric power by implementing an interim rate increase. On cross motions for summary judgment the appellate division granted the plaintiffs judgment on the issue of liability and remanded the case to the trial division to determine damages. *City of Fulton* v. *United States*, 680 F.2d at 122. As a result of the Federal Courts Improvement Act

(the Act), Pub. L. No. 97-164, 96 Stat. 25 (1982) the Court of Claims ceased to exist and its trial functions were assumed by the newly created Claims Court. Under the Act, the Claims Court obtained jurisdiction over the remaining issues in the case. *Id.* § 403(d), 96 Stat. at 58.

The parties settled those issues and the Claims Court ordered an entry of judgment in accordance with that settlement determining the amounts appellees were to recover. After the Claims Court issued a final judgment, *City of Fulton* v. *United States*, No. 509-80C (Cl. Ct. January 20, 1984), the government appealed to this court on the issue of liability. The appellant challenges the final judgment for failure to rule in its favor on the issue on which the Court of Claims had granted summary judgment for the appellees.

I

Appellees have filed a motion to dismiss for lack of jurisdiction. They argue that the provision of the Act transferring cases from the Court of Claims to the Claims Court only applied to pending cases, that is, cases where the court had not yet acted. Since the court had acted on the issue of liability before the effective date of the Act, they argue that the government's only source of appellate review is in the Supreme Court.

We reject that argument. While it is true that this court does not sit in appellate review of the Court of Claims, *Gindes* v. *United States*, 740 F.2d 947, 951 (Fed. Cir.) (Nichols, J., concurring), *cert. denied*, 105 S. Ct. 569 (1984), this court does have the jurisdiction to hear an appeal from a final judgment of the Claims Court. We therefore deny the motion to dismiss.

II

While we do have jurisdiction to hear the appeal, we nevertheless must regard the Court of Claims decision

as the law of the case which we would not overrule unless one of three exceptional circumstances exists. *Gindes* v. *United States*, 740 F.2d at 949-950. The only exception arguably present here is the third one, that the Court of Claims decision "was clearly erroneous and would work a manifest injustice." 740 F.2d at 950. However, the appellant has not made the required "strong showing of clear error." *United States* v. *Turtle Mountain Band of Chippewa Indians*, 612 F.2d 517, 521 (Ct. Cl. 1979). "Only if we were convinced to a certainty that [the] prior decision was incorrect would we be warranted in now reexamining [it]." *Northern Helex Co.* v. *United States*, 634 F.2d 557, 562 (Ct. Cl. 1980); *accord Perkin-Elmer Corp.* v. *Computervision Corp.*, 732 F.2d 888, 901, 221 USPQ 669, 679 (Fed. Cir. 1984). We are not "convinced to a certainty" that the Court of Claims decision is incorrect. Indeed, with due respect to the Fifth Circuit which reached a contrary result in *United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F.2d 392 (1982), we are convinced the Court of Claims reached the correct result: the interim rate increase was a breach of contract.* *A fortiori*, the outcome would be the same if we would regard the Court of Claims decision as a binding precedent which may be overruled only by this court sitting in banc. *Capital Electric Co.* v. *United States*, 729 F.2d 743, 746 (Fed. Cir. 1984); *South Corp.* v. *United States*, 690 F.2d 1368

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* For the proposition that in transferring both the rate formulation and rate approval functions to the Secretary of Energy there was no creation of a power to implement interim rates, we rely in particular on the reasoning of the district court in *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, No. H-80-1781 (S.D. Tex. August 13, 1982), *vacated and judgment for plaintiff entered*, No. H-80-1781 (S.D. Tex. April 25, 1983) (pursuant to *United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F.2d 392 (5th Cir. 1982)), *aff'd*, 712 F.2d 1414 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 997 (1984).

(Fed. Cir. 1982). Recognizing this, appellant filed a suggestion for a hearing in banc. However, since no member of this panel nor any judge on the court requested a polling on a hearing in banc (Federal Rules of Appellate Procedure 35 and Local Procedural Rule 27) the suggestion for initial hearing in banc is denied. Consequently, if we regarded the Court of Claims decision as binding precedent this panel would be without the ability to alter its result. Nor would we wish to.

Accordingly, the decision of the Claims Court is affirmed.

AFFIRMED

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 509-80C

(1) CITY OF FULTON, (2) CITY OF LAMAR, (3) CITY OF THAYER, (4) CITY OF PIGGOTT

v.

THE UNITED STATES

(Decided May 19, 1982)

ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Before KASHIWA, KUNZIG,* and SMITH, *Judges*.

SMITH, *Judge*, delivered the opinion of the court:

This contract case comes before the court on the parties' cross-motions for summary judgment. Plaintiffs are four cities (Cities) in Missouri and Arkansas which entered into contracts with the Southwestern Power Administration (SWPA) of the Department of the Interior for the purchase of electric power pursuant to section 5 of the Flood Control Act of 1944.[1] In 1979 SWPA announced an interim rate increase which plaintiffs contend violated section 5 of the Flood Control Act and breached their contracts with the Government. The Government, in turn, argues that the interim rate increase was necessary to cover rapidly rising operating

* Judge Robert L. Kunzig participated in the oral argument and agreed to the determination in this case before his death on February 21, 1982.

[1] 16 U.S.C. § 825s (1976 & Supp. III 1979).

costs and was adopted in compliance with federal statutes and the contracts with the Cities. We reject the Governments' position, and consequently, grant plaintiffs' motion for summary judgment and deny defendant's cross-motion for summary judgment. Plaintiffs are awarded judgment on the issue of liability on their breach of contract claims.

I.

In enacting section 5 of the Flood Control Act of 1944, Congress authorized the Secretary of the Interior to transmit and dispose of electric power generated at reservoir projects under the control of the Department of the Army. Section 5 requires that such power be provided "at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission."[2] For several years the Cities received all or part of their electrical power from the Government, pursuant to contracts entered into between plaintiffs[3] and the SWPA.

[2] The full text of section 5 of the Flood Control Act, 16 U.S.C. § 825s (1976 & Supp. III 1979), provides:

"Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules *to become effective upon confirmation and approval by the Federal Power Commission*. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in

In 1977, Congress enacted the Department of Energy Organization Act (DEOA),[4] which abolished the Federal Power Commission (FPC) and transferred the functions of the Secretary of the Interior under the Flood Control Act to the Secretary of Energy.[5] Pursuant to the DEOA, the Secretary of Energy by published order[6] delegated to the Federal Energy Regulatory Commission (FERC) the authority to confirm and approve rates on a final basis which was originally conferred upon the FPC. In the same order the Secre-

wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts." (Emphasis supplied.)

[3] For purposes of this suit, four contracts between plaintiffs and SWPA are at issue: (1) City of Fulton contract, entered into on April 29, 1977, and effective until May 31, 1987; (2) City of Lamar contract, entered into on April 29, 1977, and effective until May 31, 1987; (3) City of Thayer contract, entered into on April 15, 1963, and effective until June 30, 1983; and (4) City of Piggott contract, entered into on June 21, 1965, and effective until June 30, 1987.

[4] 42 U.S.C. §§ 7001-7375 (Supp. III 1979).

[5] *See* note entitled "Transfer of Functions" accompanying section 5 of the Flood Control Act, 16 U.S.C. § 825s (Supp. III 1979), which states:

"The functions of the Secretary of the Interior under this section were transferred to the Secretary of Energy by section 7152(a)(1) of Title 42, The Public Health and Welfare.

"The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare."

[6] Delegation Order No. 0204-33, 43 Fed. Reg. 60,636 (1978).

tary of Energy also delegated to the Assistant Secretary for Resource Applications[7] the authority to confirm and place in effect on an interim basis rates for electrical power sold by the SWPA. On March 1, 1979, the Assistant Secretary confirmed the rate increase at issue in this case, effective April 1, 1979, on an interim basis, subject to final confirmation by the FERC. Plaintiffs have paid the increased rate since April 1, 1979, and now seek to recover a money judgment from the Government in the amount of the rate increase. Jurisdiction is proper in this court under 28 U.S.C. § 1491 (Supp. III 1979). The central issue in the case before us is whether the interim rate increase authorized by the Assistant Secretary breached plaintiffs' contracts with the SWPA. We conclude that there was such a breach.

II.

Because the suit before us alleges breach of express contracts between plaintiffs and the SWPA, our inquiry necessarily begins with an analysis of the terms of the contracts. As stipulated by the parties, the relevant portion of the Fulton-SWPA contract pertaining to changes in rates and charges provides:

> It is understood and agreed that the rates and/or terms and conditions set forth in the said Rate Schedule "F-1", with the confirmation and approval of the Federal Power Commission, may be increased, decreased, modified, superseded, or supplemented, at any time, and from time to time, and that if so increased, decreased, modified, superseded, or supplemented, the *new rates* and/or terms and conditions *shall thereupon become effective* and applicable to the purchase and sale of Firm Power and Firm Energy under this Contract *in accordance with and on the effective date*

[7] A later amendment to the original delegation order substituted the Assistant Secretary for Conservation and Renewable Energy for the Assistant Secretary for Resource Applications.

> *specified in the order of the Federal Power Commission containing such confirmation and approval.* [Emphasis supplied.]

As stipulated by the parties, the relevant portion of the Lamar-SWPA contract exactly follows the Fulton-SWPA contract. Although worded slightly differently, the Thayer-SWPA and Piggott-SWPA contracts contain language virtually identical to that set forth in the Fulton-SWPA contract quoted above.[8]

An examination of each of the four Cities' contracts with the SWPA reveals that each contract provided for periodic rate increases to be effective upon the order of the FPC confirming and approving such increases. However, by the time the interim rate increases now at issue were made effective, the FPC had been abolished by the DEOA. The Government seizes upon the abolition of the FPC and the concurrent transfer of its administrative functions in formulating an ingenious defense to plaintiffs' breach of contract claim.

The Government asserts that a specific provision of the DEOA, appearing at 42 U.S.C. § 7151(b), confers upon the Secretary of Energy the power to perform former *FPC* functions, including rate approval and confirmation under section 5 of the Flood Control Act. 42 U.S.C. § 7151(b) (Supp. III 1979) provides:

[8] The Thayer-SWPA contract stated in part:

"* * * It is understood and agreed that the rates set forth in the said Rate Schedule 'F-1' may, with the confirmation and approval of the Federal Power Commission, be increased, decreased, or superseded, at any time, and from time to time, and that if so increased, decreased or superseded, the new rates shall thereupon become effective and applicable to the sale of Firm Power and associated energy under this Contract in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval."

The parties have stipulated that the relevant portion of the Piggott-SWPA contract pertaining to rate changes is identical to that in the Thayer-SWPA contract.

> (b) Except as provided in subchapter IV of this chapter, there are transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 7172(a)(2) of this title to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence.

Specifically, the Government contends (1) that section 7151(b) places the rate-making authority of the former FPC (including an assumed power to effect interim rates) in the Secretary of Energy; (2) that the decision to raise the rates paid by the Cities on an interim basis was a proper exercise of that authority; and (3) that such exercise was a "confirmation and approval" within the meaning of these contracts.

The Government's first contention fails upon a close examination of section 7151(b). Of critical importance is the introductory clause to the subsection, which states, "[e]xcept as provided in subchapter IV of this chapter." Subchapter IV (42 U.S.C. §§ 7171-7177) creates the FERC as an independent regulatory commission within the Department of Energy. Significantly, many of the rate approval functions of the FPC were transferred to the FERC in subchapter IV, such administrative review to be exercised *independently* of the Secretary of Energy. The first sentence of 42 U.S.C. § 7151(b), therefore, does not clearly provide a statutory basis for the Secretary of Energy's claimed authority to adopt an interim rate increase for SWPA customers.

The Government's argument, however, does not fail solely upon an examination of the first sentence in section 7151(b). The second sentence of the subsection provides, "The Secretary may exercise any power described in section 7172(a)(2) of this title to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction

pursuant to the preceding sentence." In essence, the Government contends that section 7172(a)(2) powers encompass interim rate orders under the Flood Control Act. A review of 42 U.S.C. § 7172(a)(2) does reveal references to FERC rate-approval powers under the Federal Power Act and the Natural Gas Act, but *no* reference to similar powers under the Flood Control Act.[9] Thus, section 7151(b) of the DEOA, considered as a whole, does not on its face authorize the Secretary of Energy to effect interim rate increases under the Flood Control Act.[10]

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[9] 42 U.S.C. § 7172(a)(2) (Supp. III 1979) provides:

"(2) The Commission may exercise any power under the following sections to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission:

"(A) sections 4, 301, 302, 306 through 309, and 312 through 316 of the Federal Power Act; and

"(B) sections 8, 9, 13 through 17, 20, and 21 of the Natural Gas Act."

[10] The Government has cited case authority in support of the general position that the FPC was authorized to issue interim rate orders. *See, e.g., F.P.C. v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 150 (1962), citing *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), and *New England Divisions Case*, 261 U.S. 184 (1923). Reasoning from these cases, the Government concludes that the Secretary of Energy enjoys a similar authority under the Flood Control Act, to the extent that the Secretary of Energy has assumed the duties of the FPC under the Flood Control Act. Even assuming *arguendo* the latter point, we are unable to agree with the Government's sweeping conclusion regarding interim authority under the Flood Control Act. The cases cited by the Government regard the FPC's authority to issue interim rate orders under the Natural Gas Act, not the Flood Control Act. We also note that in the principal case cited by the Government, *Tennessee Gas*, the Supreme Court was called upon to consider the authority of the FPC to order an interim rate *reduction*, issued by the FPC pursuant to its duty under the Natural Gas Act to protect consumers from excessive rate charges. Thus, although *Tennessee Gas* upholds FPC authority to issue interim rate orders under the Natural Gas Act, it makes no reference to

Moreover, the Government's argument that the Secretary of Energy was empowered by the DEOA to implement interim rates under the Flood Control Act ignores an explicit provision of the DEOA, which provides in pertinent part:[11]

> If any provision of any Act, the functions of which are transferred, vested, or delegated pursuant to this chapter, provides administrative procedure requirements in addition to the requirements provided in this subchapter, such additional requirements shall also apply to actions under that provision.

Under section 5 of the Flood Control Act, confirmation and approval of the FPC was required *prior* to the implementation of any rate increase for SWPA customers. This FPC confirmation and approval function constitutes an additional "administrative procedure requirement" which, by the literal terms of section 7191(a)(1), continues to apply to administrative actions under the Flood Control Act. In short, the Secretary of Energy is bound by the administrative procedures set forth in the Flood Control Act, as was his predecessor, the Secretary of the Interior.

The Government's elaborate argument that the Secretary of Energy was provided with authority to enact interim rate increases under the DEOA also fails to address plaintiffs' central theory of recovery in this case, breach of contract. As the Government concedes, we must enforce a mutually agreed-upon contract according to its terms.[12] The contracts in question state that

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FPC authority under the Flood Control Act and therefore cannot be viewed as controlling in the case before us.

[11] 42 U.S.C. § 7191(a)(1) (Supp. III 1979).

[12] *See California* v. *United States*, 213 Ct. Cl. 329, 341, 551 F.2d 843, 850, *cert. denied*, 434 U.S. 857 (1977); *Eldorado Canyon Resort, Inc.* v. *United States*, 209 Ct. Cl. 759, 760-61 (1976) (order); *Broome Constr., Inc.* v. *United States*, 203 Ct. Cl. 521, 530, 492 F.2d 829, 834 (1974).

rates may be increased "with the confirmation and approval of the Federal Power Commission * * * in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval." While this court is not empowered to review the substantive grounds for the rate increase, where rate-making procedures give rise to a breach of contract claim, we must consider whether those procedures were exercised in compliance with the contracts.

In the present case, the terms of the contracts clearly contemplate an increase in rate charges only after "confirmation and approval" by the FPC. No provision for interim increases even exists in the contracts. It is well established in this court that, where the language of a contract is unambiguous, contractual terms will be given their usual and ordinary meaning.[13] We consider FPC/FERC review to be an important administrative procedure which cannot be cavalierly ignored by the Department of Energy. Moreover, section 5 of the Flood Control Act provided that rate schedules were "to become effective upon confirmation and approval by the Federal Power Commission." The rule that contract terms will be given their ordinary meaning is particularly appropriate where the contract language is easily construed in harmony with the governing statute or regulation.[14] Here, the very language of the statute itself is incorporated into the contract terms. Finally, we

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[13] *American Science & Eng'g. Inc.* v. *United States*, 228 Ct. Cl. ___, ___, 663 F.2d 82, 88 (1981); *S.W. Aircraft Inc.* v. *United States*, 213 Ct. Cl. 206, 212, 551 F.2d 1208, 1212 (1977); *Hotpoint Co.* v. *United States*, 127 Ct. Cl. 402, 406, 117 F. Supp. 572, 574, *cert. denied*, 348 U.S. 820 (1954).

[14] *See, e.g., American Science & Eng'g, Inc.* v. *United States*, 228 Ct. Cl. at ___, 663 F.2d at 88; *Timber Access Indus. Co.* v. *United States*, 213 Ct. Cl. 648, 658, 553 F.2d 1250, 1256 (1977); *Victory Constr. Co.* v. *United States*, 206 Ct. Cl. 274, 287, 510 F.2d 1379, 1386 (1975).

are guided by Supreme Court precedent prohibiting unilateral rate increases proposed by utilities in derogation of express contractual terms, otherwise known as the *Mobile-Sierra* doctrine.[15] As applied to this case, the *Mobile-Sierra* doctrine dictates that the express contracts between plaintiffs and the SWPA, which contracts provide procedural safeguards prior to initiation of a rate increase, cannot be unilaterally modified by administrative fiat.

In addition to considering the governing statutes and literal language of the contracts, we are also persuaded by past agency practice in interpreting provisions of the contracts pertaining to rate increases. Plaintiffs contend that since the passage of the Flood Control Act in 1944, and up to passage of the DEOA in 1977, the Secretary of the Interior always sought FPC confirmation and approval of rate increases prior to making them effective. In support of this position, plaintiffs cite to the 1957 order of the FPC confirming and approving the "F-1" rate schedule[16] on a final basis. The Government, in turn, responds by pointing out that the F-1 rate schedule was the *only* rate schedule applicable to plaintiffs' contracts during the 1957-79 period; that every other instance referred to by plaintiffs involved nothing more than an extension of existing rates, and that a single example of FPC confirmation and approval of rate *increases* on a final basis does not preclude the FPC's authority to confirm and approve rate increases on an interim basis. Additionally, the Government asserts that the FPC did, in fact, approve interim rate in-

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[15] *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *F.P.C.* v. *Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

[16] Rate schedule F-1 was established in 1957 and made applicable to all firm power customers of the SWPA's system. As of May 1981, the SWPA was selling power to 55 customers (including plaintiffs) in a 6-state region consisting of Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas.

creases under the Flood Control Act in 1947,[17] and has approved interim rate increases three times since 1947.

An examination of the Government's contention regarding the 1947 rate increase, however, reveals that the "interim" rate increase approved by the FPC in 1947 was in fact final approval by the FPC of the first, yet independent, part of a two-part rate increase sought by the SWPA. Thus, in 1947, rates were not first placed into effect on an interim basis subject to a later confirmation, as was the case in 1979.[18] The second[19] and third[20] instances cited by the Government since 1947 were not approvals of interim rate increases sought by the SWPA under the Flood Control Act, but rather were interim rate increases sought by the Bonneville Power Administration under a separate statute, the Bonneville Project Act.[21]

Finally, we turn to the fourth instance cited by the Government in which the FPC allegedly approved a rate increase pursuant to the Flood Control Act on an interim basis. A review of the record confirms the Government's contention that in 1975 the FPC, pursuant to the Flood Control Act, did approve rate schedules of the Southeastern Power Administration (SEPA) on an interim basis.[22] However, the record also reflects that the Department of the Interior strongly opposed this action by the FPC, as indicated in a letter of July 11, 1975, from the Assistant Secretary to the Chairman of the FPC which stated in part:

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[17] F.P.C. Docket No. IT-5971 (Feb. 13, 1947).

[18] This court was advised by the parties at oral argument that the FERC has only recently approved the interim rate increase affecting the SWPA customers at issue in this case.

[19] F.P.C. Docket No. E-8978, 54 F.P.C. 808 (1975).

[20] F.P.C. Docket No. E-9563, 42 Fed. Reg. 31,492 (1977).

[21] 16 U.S.C. §§ 832-832l, 838-838k (1976 & Supp. III 1979).

[22] F.P.C. Docket No. E-7002, 54 F.P.C. 3 (1975).

> We respectfully suggest that significant aspects of the Commission's action were without statutory authority and arbitrary. Under the Flood Control Act, the Commission's authority is limited to either confirming and approving the rates established by the Secretary or disapproving them; it does not have the authority to fix substitute rates, as it does for regulated utilities under the Federal Power Act. It follows from this that the Commission does not have authority to make its confirmation and approval conditional upon the outcome of further proceedings or upon the agreement by SEPA to make refunds or credits if the Commission changes its mind. * * *

In addition to this strong opposition to the very exercise of power at issue here, voiced by the Department of the Interior itself, the 1975 interim rate increase can be further distinguished from the rate increase now at issue. First, the 1975 FPC action was in regards to a rate increase sought by the South*eastern* Power Authority, not by the SWPA, which serves a separate group of customers and may involve contracts with different terms. The 1975 action was also apparently effected in the absence of *contractual* terms requiring FPC approval on a final basis, in stark contrast to the 1979 interim increase involved here.

In summary, our review of the history of administrative practice under the Flood Control Act, considered as a whole, does not support the Government's view of FPC rate confirmation and approval. Significantly, we are unable to discover a single instance in the period 1944-77 in which the FPC, pursuant to the Flood Control Act, approved on an *interim* basis a rate increase sought by the SWPA. Moreover, it was clearly the practice of the Secretary of the Interior, consistent with contractual requirements, to seek final confirmation and approval of rates by the FPC before making them effective. Accordingly, we find the actions of the

Assistant Secretary of Energy in authorizing an interim rate increase prior to final approval of the FERC not supported by previous administrative practice in applying section 5 of the Flood Control Act. Although the interpretation given a statute by the agency charged with its administration is entitled to considerable deference,[23] where authority in the original statute (Flood Control Act) is claimed as the basis for a departure from past administrative practice, the agency's interpretation is subject to rigorous judicial review.[24]

In closing, we note that our resolution of the breach of contract claim now before us is further assisted by persuasive precedent established in a federal district court opinion disposing of very similar issues. In *United States* v. *Tex-La Electric Cooperative, Inc.*,[25] the Government brought suit against Tex-La, a SWPA customer, for failing to pay the interim rates prior to final confirmation and approval by the FERC. The two contracts at issue in *Tex-La* both required that any rate increase be "'in accordance with and on the effective date specified in the final order of the FPC containing such confirmation and approval.'"[26] In granting Tex-La summary judgment, the court concluded that "[t]he Section 5 [Flood Control Act] confirmation and approval function, incorporated into the contracts at hand, cannot be

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[23] *See, e.g. Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Selman* v. *United States*, 204 Ct. Cl. 675, 681, 498 F.2d 1354, 1357 (1974).

[24] *See, e.g. NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974); *F.P.C.* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513-14 (1949). Although the substantive rate increase is not before us, when the increase impinges on contractual rights, we are empowered to review past administrative practice in evaluating the breach of contract claim.

[25] *United States* v. *Tex-La Elec. Coop., Inc.*, 524 F. Supp. 409 (E.D. La.), *appeal docketed*, No. 81-3715 (5th Cir. Nov. 20, 1981).

[26] *Id.* at 414.

unilaterally abrogated."[27] We adopt a similar rationale in concluding that the Government breached its contract with plaintiffs in the case at bar.[28]

In summary, we hold that the rate increase ordered by the Assistant Secretary of Energy on an interim basis violated that provision of the contracts between plaintiffs and the Government which required "confirmation and approval" by the Federal Power Commission. All other arguments raised by the Government, although not directly addressed in this opinion, have been considered and found to be without merit.

Accordingly, after consideration of the submissions of the parties, and after hearing oral argument, defendant's cross-motion for summary judgment is denied, and plaintiffs' motion for summary judgment is granted. We award plaintiffs judgment on the issue of liability and remand the cause to the trial division to determine the amount of recovery under Rule 131(c).

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[27] *Id.* at 421.

[28] A second court has recently adopted the "careful analysis" employed by the *Tex-La* court. *See United States* v. *Northeast Texas Elec. Coop.*, No. H-81-604 (S.D. Tex. Dec. 9, 1981), *appeal docketed*, No. 82-2014 (5th Cir. Jan. 13, 1982). *See also Arkansas Power & Light Co.* v. *Schlesinger*, No. 79-1263 (D.D.C. Oct. 20, 1980), *appeal dismissed*, No. 80-2573 (D.C. Cir. Jan. 26, 1981). The Government has cited three federal district court cases as precedent for the view that the Secretary of Energy is authorized to implement interim rate increases pursuant to section 5 of the Flood Control Act, and that such interim increases do not constitute a breach of contract. *See Pacific Power & Light Co.* v. *Duncan*, 499 F. Supp. 672 (D. Or. 1980); *Colorado River Energy Distrib. Ass'n* v. *Lewis*, 516 F. Supp. 926 (D.D.C. 1981); and *Montana Power Co.* v. *Edwards*, No. 80-842PA (D. Or. May 10, 1981). In *Pacific Power* and *Montana Power*, decided by the same judge, there is virtually no discussion of the breach of contract issue which forms the basis of plaintiffs' complaint in the case before us, and thus the cases lack significant precedential value. *Colorado River* did not involve the Flood Control Act, was not a breach of contract case, and is therefore similarly inapposite.

APPENDIX C

IN THE UNITED STATES CLAIMS COURT

No. 509-80C

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(1) CITY OF FULTON, (2) CITY OF LAMAR, (3) CITY OF THAYER (4) CITY OF PIGGOTT

v.

THE UNITED STATES

[Filed: January 20, 1984]

ORDER FOR ENTRY OF JUDGMENT

On May 19, 1982, the United States Court of Claims awarded judgment on the issue of liability for breach of plaintiffs' contracts with the Southwestern Power Administration (SWPA). 680 F.2d 115 (Ct.Cl. 1982). Each plaintiff had a separate contract with SWPA, and each plaintiff's claim was based upon breach of its own contract. The Court of Claims remanded the case to its trial division to determine the amount of recovery. The case was transferred to the United States Claims Court pursuant to section 403(d) of the Federal Courts Improvement Act of 1982. 28 U.S.C. § 171 note (1983).

Negotiations by the parties have resulted in agreements as to the amounts of damages due the Cities of Fulton, Lamar and Thayer. The parties have been unable to agree upon the damages due to the City of Piggott, and separate proceedings are continuing on that issue. The parties agree that all proceedings necessary to establish the amount of the judgments for the Cities of Fulton, Lamar and Thayer have been con-

cluded and that the three cities are entitled to the following amounts:

City of Fulton	$232,245.44
City of Lamar	$627,128.55
City of Thayer	$ 95,442.22

On December 2, 1983, the three cities moved for entry of a separate final judgment on their behalf. Defendant's opposition was filed December 15, 1983, and plaintiff's reply was filed on December 22, 1983. Defendant's opposition is based upon the conclusion that this court lacks jurisdiction to enter final judgments for the three cities at this time. Defendant cites the provisions of 28 U.S.C. § 2517 and questions whether the partial judgment entered pursuant thereto can be a "final judgment" under RUSCC 54(b) subject to appeal to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1295(a)(3).

Plaintiffs assert that this case is not a single cause of action, but is a joining of four separate and distinct causes of action in a single proceeding. As a result, judgments in favor of the three cities will affect only their respective controversies, payment of those judgments would discharge defendant only with respect to those particular causes of action, and the judgments would not have to be designated "partial judgments." Plaintiffs also contend that this court's jurisdiction to enter "partial judgments" is clear and that defendant's concern about an appeal to the CAFC does not raise the question of a jurisdictional bar to the entry of partial judgments.

This court has jurisdiction to enter partial judgments. 41 U.S.C. § 609(a) (Supp. V 1981); 28 U.S.C. § 2517(b); *Alyeska Pipeline Service Co.* v. *United States*, 227 Ct.Cl. 545 (1981).

RUSCC 54(b) requires, when multiple parties are involved, as in this case, a final judgment may be entered as to one or more but fewer than all of the parties "only

on an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

It is found that judgments in this case in favor of the Cities of Fulton, Lamar and Thayer would give effect to the 1982 decision of the Court of Claims on liability issues and to the agreements between the parties concerning damages. There is no just reason for further delay in entry of judgments in the amounts agreed upon for those cities. Proceedings on the claim of the City of Piggott will be continued for resolution of issues which are not applicable to the other plaintiffs' claims.

Accordingly, IT IS ORDERED plaintiffs' motion for entry of judgment is ALLOWED and judgments will be entered in the following amounts:

For the City of Fulton	—	$232,245.44
For the City of Lamar	—	$627,128.55
For the City of Thayer	—	$ 95,442.22

The claim of the City of Piggott will be determined in further proceedings and a separate judgment.

/s/ Kenneth R. Harkins
KENNETH R. HARKINS, *Judge*

IN THE UNITED STATES CLAIMS COURT

No. 509-80 C

(1) CITY OF FULTON, (2) CITY OF LAMAR,
(3) CITY OF THAYER, (4) CITY OF PIGGOTT

v.

THE UNITED STATES

[Filed: Jan. 20, 1984]

JUDGMENT

Pursuant to the order for entry of judgment, of January 20, 1984, that there is no just reason for delay, it was held that plaintiffs, (1) City of Fulton, (2) City of Lamar, and (3) City of Thayer are entitled to recover.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs recover of and from the United States the sums as listed below, with the claim of the City of Piggott to be determined in further proceedings.

(1) City of Fulton	$232,245.44
(2) City of Lamar	$627,128.55
(3) City of Thayer	$ 95,442.22

FRANK T. PEARTREE
Clerk of Court

/s/ Debra L. Samlet
DEBRA L. SAMLET
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-913
509-80C

CITY OF FULTON, CITY OF LAMAR,
CITY OF THAYER, CITY OF PIGGOTT, APPELLEES,

v.

THE UNITED STATES, APPELLANT.

ON APPEAL FROM THE UNITED STATES CLAIMS COURT

JUDGMENT

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

ENTERED BY ORDER OF THE COURT
George E. Hutchinson, Clerk

/s/ George E. Hutchinson
Clerk

DATED January 9, 1985

ISSUED AS A MANDATE: February 19, 1985

APPENDIX E

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

Nos. 81-3715, 82-2014

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,

v.

TEX-LA ELECTRIC COOPERATIVE, INC.,
DEFENDANT-APPELLEE.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,

v.

NORTHEAST TEXAS ELECTRIC COOPERATIVE, INC.,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

Nov. 26, 1982

Before WISDOM, BROWN and RANDALL. *Circuit Judges.*

RANDALL, *Circuit Judge:*

These consolidated cases come to us on appeal from the Eastern District of Louisiana and the Southern District of Texas. The single appellee,[1] Tex-La Electric Cooperative, Inc., has thus far successfully challenged

[1] There are actually two appellees in two consolidated cases, *United States* v. *Tex-La Electric Cooperative, Inc.* (No. 81-3715) and *United States* v. *Northeast Texas Electric Cooperative, Inc.* (No. 82-2014); however, since both cases present precisely the same legal issues, involve the same disputed funds, and concern exactly the same real parties in interest, we shall treat them throughout this opinion as one case involving "Tex-La" and "the government."

the validity of the government's new system for setting and raising the rates set out in the schedules according to which federally owned hydroelectric power is sold.

The novel situation that this case presents is this: in 1979, for the first time ever, new and higher federal electricity rates calculated pursuant to the Flood Control Act of 1944 were put into effect on an interim basis without an independent review by an independent agency. Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s (1976 & Supp. IV 1980), imposes a requirement that rates first be *prepared* by the Secretary of the Interior and then *approved and confirmed* by the independent Federal Power Commission before becoming effective. It is the practical effect of this bifurcated scheme that forms the basis for this suit. The principal question before us is whether today, when the Federal Power Commission no longer exists (and when its functions have been largely taken over by the Federal Energy Regulatory Commission), "approved and confirmed" can be interpreted to vest interim rate implementing authority in the hands of the Secretary of the Interior's successor, the Secretary of Energy.

Although we reject many of the government's arguments and accept all of Tex-La's except one,[2] we hold for the reasons given below that the Secretary does have interim ratemaking authority under section 5 of the Flood Control Act of 1944. The decisions of the two district courts are therefore reversed.

I. HOW THIS CASE HAS ARISEN

The key to the instant case lies in its history. What follows is not simply "background." Without the com-

[2] We reject the contention of both parties that the 1977 Department of Energy Organization Act, 42 U.S.C. §§ 7101 to 7352 (Supp. IV 1980), does not materially change section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s (1976 & Supp. IV 1980). We set forth our reasoning in Part II, *infra*.

plex mix of partly conflicting statutes, rules, and unwritten practices that have come into being since the middle 1930s, this case simply would not have arisen.

A. Developments in the Law

At least since the New Deal Congress has from time to time provided for the construction of various dams to control flooding, encourage commerce and navigation, and provide water for farming and other purposes. The hydroelectric potential of these early projects, so important today, was then often purely secondary and, in the case of the Flood Control Act of 1944 that governs the present case, was nearly forgotten entirely. *See* S.Rep. No. 1030, 78th Cong., 2d Sess. 3 (1944) (adding section 5 of the Act to the House bill, which had overlooked the fact that the proposed dams would produce electricity that would have to be sold). Many of these dams were built and run by the Army Corps of Engineers. The Corps was directed to turn over any surplus hydroelectric power to the Secretary of the Interior. The Secretary, in turn, had the responsibility for preparing appropriate rate schedules for the sale of the power. He was required to fix the schedules at the lowest level possible sufficient to pay for the cost of producing and transmitting the power while also amortizing that part of the dam construction costs that could be fairly attributable to the production of power. Flood Control Act of 1944, § 5, 16 U.S.C. § 825s. The hydroelectric facilities, in other words, were statutorily designed to be entirely self-supporting.

In order to sell the hydroelectric power turned over to him by the Corps of Engineers, the Secretary of the Interior created what eventually became five regional Power Marketing Administrations.[3] The immediate de-

[3] The five PMAs, as they are called, are the Alaska Power Administration, the Bonneville Power Administration (the biggest and most important), the Southeastern Power Administration, the

fendant in this suit, the Southwestern Power Administration (SWPA), was created in 1943, *see* 8 Fed.Reg. 12,142 (1943), and was given the authority to manage all of the Corps of Engineers hydroelectric facilities in Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas, *see* 10 Fed.Reg. 14,527-28 (1945). The administrator of SWPA was delegated the responsibility, among other things, of preparing rate schedules and of doing the necessary accounting and cost allocation studies.

After the rate schedules were drawn up, but before they could become effective, they were submitted to the independent Federal Power Commission for review. The Flood Control Act specifically provides that the schedules were "to become effective upon confirmation and approval by the Federal Power Commission." Flood Control Act § 5. (This is the statutory provision that lies at the heart of this suit.) The Commission would generally hold public hearings, and then render a formal opinion either approving the rates and putting them into effect, or remanding the case to the appropriate Power Marketing Administration for further consideration.[4]

Under this system, all remained relatively peaceful until the mid-1970s. Then two things happened. First, the days of cheap energy ended and those of rapid inflation began, thus making it necessary for the Power

Southwestern Power Administration, and the Western Area Power Administration. The Western PMA is actually a product of the 1977 DOE Act, *supra note* 2, and was created by the Secretary of Energy to administer certain hydroelectric projects that had previously been run by the Bureau of Reclamation.

[4] The procedures followed by the Federal Power Commission and the reasons justifying them present an extremely complex issue that we address in Part III.A, *infra*.

Marketing Administrations to raise rates higher and more often than had ever before been necessary. *Compare United States Department of the Interior, Bonneville Power Administration, Docket Nos. E-6611, E-6905 & E-7242*, 34 F.P.C. 1462, 1464 (1965) (big administrative to-do over *three* percent rate increase), *with Secretary of Energy, Bonneville Power Administration, Docket No. EF-80-2011*, 45 Fed. Reg. 79,545, 79,546 (1980) (big administrative to-do over *eighty-eight* percent increase). And second, in 1977 Congress enacted the Department of Energy Organization Act, Pub.L.No. 95-91, 91 Stat. 565 (codified at 42 U.S.C. §§ 7101 to 7352 (Supp. IV 1980)). The enactment of the DOE Act has given the parties here something to fight about; the rapid rise in the cost of everything over the past few years has made it worth their while.[5]

Because of the way it affects the above-quoted provisions of the Flood Control Act, the DOE Act has created the uncertainty that has produced the present suit. Congress passed the DOE Act because it found that "responsibility for energy policy, regulation, and research, development and demonstration is fragmented in many departments and agencies and thus

[5] Although the money immediately at stake in the present suit actually amounts to about $46 million, the government has informed us that its total amount at risk under section 5 of the Flood Control Act is about $800 million. It hardly needs emphasizing that if we were to affirm the district court, the power customers who have already paid the interim rates of the several PMAs (which is almost all customers) would create a veritable stampede in their rush to get their money back from the Court of Claims (now the Court of Appeals for the Federal Circuit). A further $400 million in collected interim rates is not at risk because the Bonneville Power Administration's interim collections have been sanctioned in a new act that applies only to the BPA. *See* Pacific Northwest Electric Power Planning and Conservation Act, § 7(i)(6), 16 U.S.C. § 839e(i)(6)(Supp. IV 1980).

does not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs." DOE Act § 101(4), 42 U.S.C. § 7111(4). The idea behind the Act was centralization and administrative streamlining, but the result for those charged with interpreting the Flood Control Act has been confusion.

The DOE Act transfers the Flood Control Act functions of both the Secretary of the Interior and the Federal Power Commission. With respect to the Secretary of the Interior, the Act plainly provides:

> There are hereby transferred to, and vested in, the Secretary [of Energy] all functions of the Secretary of the Interior under section 5 of the Flood Control Act of 1944, and all other functions of the Secretary of the Interior, and officers and components of the Department of the Interior, with respect to . . . the Southwestern Power Administration.

DOE Act § 302(a)(1), 42 U.S.C. § 7152(a)(1). The Secretary of Energy thus unquestionably has the power to prepare rates through his newly acquired designee, the Administrator of SWPA.

The provisions for the functions of the old Federal Power Commission, now abolished in favor of the new (and also independent) Federal Energy Regulatory Commission, are a little more complicated. At a first reading, Title IV of the DOE Act appears to transfer *all* of the hydroelectric power regulating functions of the Federal Power Commission to the new FERC. *See United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, No. H-80-1781, typescript op. at 7-8 (S.D. Tex. Aug. 19, 1982) (explaining how misleading a first reading can be). A closer reading, however, reveals that the only hydroelectric regulatory powers given to the FERC, *see* DOE Act § 402, 42 U.S.C. § 7172, are those included in the Federal Power Act of 1935. The Flood Control Act of 1944, the 1937 Bonneville Power

Act, 16 U.S.C. § 832e (1976 & Supp. IV 1980), and the 1974 Federal Columbia River Transmission System Act, 16 U.S.C. § 838g (1976 & Supp. IV 1980), all of which regulate literally scores of federal hydroelectric projects, are not mentioned anywhere in the FERC provisions (title IV) of the DOE Act. We are therefore forced to turn to the "general transfers" section, which provides in pertinent part:

> Except as provided in title IV [the FERC provisions], there are hereby transferred to, and vested in, the Secretary [of Energy] the function of the Federal Power Commission, or of the members, officers, or components thereof.

DOE Act § 301(b), 42 U.S.C. § 7151(b). The legislative history of this section states in plain language that the section "transfers to the Secretary [of Energy] all functions of the Federal Power Commission, except those transferred to or vested in the Federal Energy Regulatory Commission in Section 402." H.R.Rep. No. 539, 95th Cong., 1st Sess. 65 (1977), *reprinted in* 1977 U.S.Code Cong. & Ad.News 925, 936 (Conference Report). *See* S.Rep.No. 164, 95th Cong., 1st Sess. 29 (1977), *reprinted in* 1977 U.S.Code Cong. & Ad.News 854, 882-83 (same). The inevitable conclusion, and the one that nearly everyone has drawn, is that the Secretary of Energy also exercises the confirmation and approval function of the old Federal Power Commission. *See Sam Rayburn Dam*, *supra*, typescript op. at 8; *United States* v. *Tex-La Electric Cooperative, Inc.*, 524 F. Supp. 409, 412 (E.D.La. 1981) (the opinion below); *Montana Power Co.* v. *Edwards*, 531 F. Supp. 8, 10 (D.Or. 1981) (Panner, J.); *Pacific Power & Light Co.* v. *Duncan*, 499 F.Supp. 672, 677-78 (D.Or.1980) (Panner, J.); Appellant's Opening Brief at 6; Brief for Appellee at 13. *But see City of Fulton* v. *United States*, 680 F.2d 115, 118 (Ct.Cl.1982) (misreading the statute for the reasons given in this paragraph, *supra*, and in *Sam*

Rayburn Dam, *supra*). The net result is that after October 1, 1977, the effective date of the DOE Act, *see* Exec. Order No. 12,009, 42 Fed. Reg. 46,267 (1977), *reprinted in* 42 U.S.C. § 7341 (Supp. IV 1980), the Secretary of Energy was charged both with developing federal hydroelectric power rates as the Secretary of the Interior used to do, and then with confirming and putting those rates into effect as the Federal Power Commission used to do. The Secretary in effect reviewed rates that he was ultimately responsible for developing in the first place.

This rather mysterious state of affairs lasted just over a year. Pursuant to his delegation of authority under section 642 of the DOE Act, 42 U.S.C. § 7252, the Secretary of Energy delegated away all of his federal hydroelectric rate regulation authority on December 22, 1978. He split his power into three components. First, the Assistant Secretary for Resource Applications,[6] acting through the Administrators of the five Power Marketing Administrations, was given the Secretary of the Interior's old power to prepare new rate schedules. Second, the Assistant Secretary was also given the authority "to confirm, approve, and place in effect such rates on an interim basis" pending final approval and subject to refunds with interest. And third, the old Federal Power Commission's final confirmation and approval authority was given to the independent FERC. *See Department of Energy, Power Marketing Rates, Delegation Order for Confirmation and Ap-*

[6] In 1981 the Assistant Secretary of Resource Applications' interim rate approval and implementation responsibilities were transferred to the Assistant Secretary for Conservation and Renewable Energy. *See Secretary of Energy, Southwestern Power Administration, Docket No. EF79-4011*, 47 Fed.Reg. 4562, 4562 n. 1 (1982). To avoid drawing this unnecessary distinction, we refer to both of these officers as the "Assistant Secretary" throughout this opinion.

proval, 43 Fed.Reg. 60,636-37 (1978). What used to be a bifurcated procedure—rate development, then rate approval and implementation—has thus become trifurcated: the SWPA develops rates; the Assistant Secretary provisionally approves them and puts them into effect on an interim basis; and the FERC gives "final" approval, with any interim overcharges being returned with interest.

The Power Marketing Administrations, in any event, remain bound by their pre-DOE Act contracts, some of which greatly restrict the government's right to raise rates at all.[7] The two contracts in the present case, which both appear to be typical federal hydroelectric contracts of their day, essentially track the language of section 5 of the Flood Control Act, with its bifurcated scheme for raising rates. Like any federal hydroelectric power case, the present dispute therefore has a contractual element as well.

B. The Facts of This Case

This case arises out of the application of the Secretary's new trifurcated ratemaking procedures to two hydroelectric power contracts between the SWPA and Tex-La, the "864" contract and the "921" contract.[8]

Both contracts are now just over twenty years old. The 864 contract was signed in 1958, and (for our purposes) immaterially amended in 1968. It provides for the sale of firm power and energy to Tex-La at rates developed by SWPA and implemented "with the confir-

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[7] The SWPA's so-called "Aluminum Contract," for instance, has a provision in it forbidding the government from raising rates more often than once every five years. *See Southwestern Power Administration, Rate Order SWPA-1*, 44 Fed. Reg. 13,068, 13,070 (1979)

[8] The two contracts, the material provisions of which are set out as an appendix to Tex-La's brief, are numbered 14-02-001-864 and 14-02-0001-921. Both are extensively quoted from in the opinion of the court below. 524 F. Supp. at 413 & nn. 4-5.

mation and approval of the Federal Power Commission." The 921 contract provides for the sale of four specific kinds of power—the output of a particular dam, peaking power, excess energy, and interruptible capacity—and was signed in 1960, again with subsequent immaterial amendments. The 921 contract specifically calls for rate implementation "on the effective date specified in the *final order* of the Federal Power Commission containing ... confirmation and approval" (emphasis added). Despite the slight differences in language between the two contracts, the parties have agreed that both are to be read alike, and that both essentially track the language of section 5 of the Flood Control Act.

The SWPA apparently began to experience its present financial difficulties sometime in the early 1970s. *See United States Department of the Interior, Southwestern Power Administration, Docket No. E-7172*, 42 Fed. Reg. 49,829-30 (FPC 1977) (account of six consecutive "temporary" approvals of existing rates under the 864 and 921 contracts beginning in 1971, and pending increases that somehow never materialized). By the late 1970s, SWPA's mounting deficits had become almost scandalous. The House and Senate appropriations committees demanded to know what was going on, and announced that they "intend[ed] to follow the progress of the Department [of Energy] actions closely so as to assure the necessary attention to this matter." H.R. Rep. No. 1247, 95th Cong., 2d Sess. 59 (1978). When, during the next year, the Administrator of SWPA admitted to a subcommittee of the House appropriations committee that SWPA had not had a rate increase in twenty-one years, *see Energy and Water Development Appropriations for 1980: Hearings Before [the Subcomm. on Energy and Water Dev., House] Comm. on Appropriations*, 96th Cong., 1st Sess. 2996 (1979) (remarks of SWPA Administrator Hammett), respon-

sive questioning from the Committee reflected some impatience, *id.* at 2996-98. Both because of the close congressional interest and because of the clear impossibility of supporting in the 1980s a supposedly self-sufficient program on rate schedules established in 1958 and 1960, SWPA was under considerable pressure to bring its rates up to date.

In 1978 and 1979 SWPA held, after appropriate notices in the Federal Register, *see, e.g.*, 43 Fed.Reg. 16,545 (1978) (first notice), two "public information forums" and two "public comment forums" so that the views of power customers and the interested public could be incorporated into new rate schedules. SWPA also held an informal meeting with Tex-La and its other customers to work out any remaining differences over how the new rates would be calculated. *See Appropriation Hearings, supra*, at 2997 (chronological summary of events). The new schedules were finally approved by the Assistant Secretary on March 1, 1979, effective April 1. *Southwestern Power Administration, Rate Order SWPA-1*, 44 Fed. Reg. 13,068 (1979). As provided for in the second part of the Secretary's trifurcated procedures, *see* 43 Fed. Reg. 60,636-37 (1978), this approval put the new rates into effect on an interim basis, pending final approval by the FERC. The Assistant Secretary commented: "The public participation process produced numerous and varied questions and comments. All of these have been considered; many have been accepted and incorporated in developing the revised rates." 44 Fed. Reg. at 13,069. The public participation resulted in a reduction of the originally proposed 42 percent rate increase to 33 percent. *Id.*

After a three-month-long public notice and comment period and a delay of over two years, the FERC finally rendered its decision on the interim rates. *Secretary of Energy, Southwestern Power Administration, Docket No. EF79-4011*, 46 Fed.Reg. 30,877 (FERC 1981). It

disapproved of the rates and remanded them to SWPA for further consideration because they were *too low*. This time affirmatively supported by Tex-La and its other customers, SWPA gathered more data and petitioned the FERC to reconsider its decision and approve the rates as originally submitted. After another seven-month delay, the FERC finally approved the original 33 percent increase on January 25, 1982, retroactive to the effective date of the Assistant Secretary's 1979 interim approval order.[9] *See Secretary of Energy, Southwestern Power Administration, Docket No. EF79-4011*, 47 Fed.Reg. 4562 (FERC 1982). And that is the end of the administrative part of this story.

Meanwhile, several power customers had contended that the interim rates in effect from April 1, 1979 to (as it turns out) January 25, 1982, were illegal, and either refused to pay them, or did so under protest. *See City of Fulton* v. *United States*, 680 F.2d 115 (Ct.Cl.1982) (paying under protest); *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, No. H-80-1781 (S.D. Tex. Aug. 19, 1982) (refusal to pay parallel SWPA rate increase). The two present cases—which are actually just one case, involving the same money, contracts, and real parties in interest—arose when certain of the public electric cooperatives that make up the Tex-La umbrella cooperative refused to pay the increase. The government sued to collect the money owing on August 1, 1980, and March 27, 1981. The parties quickly agreed that there were no material issues of contested fact, and submitted their cases for summary judgment. The Eastern District of Louisiana ruled in favor of Tex-La

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[9] The parties have informed us that the retroactivity of this final FERC order has become the subject of a motion currently pending before the United States District Court for the Eastern District of Louisiana. *See United States* v. *Tex-La Electric Cooperative, Inc.*, Civil Action No. 80-2813, § K, Mag. 4 (E.D.La. filed May 10, 1982).

on September 9, 1981, 524 F. Supp. 409 (E.D.La.1981), and rendered final judgment accordingly on September 14. In the other case, the Southern District of Texas reached exactly the same result on December 9, 1981, "'for the reasons stated in the careful analysis of the questions . . . [presented] to be found in the opinion of the United States District Court for the Eastern District of Lousiana." The government now appeals from the judgments rendered in both decisions.

II. THE EFFECT OF THE 1977 DOE ACT ON SECTION 5 OF THE FLOOD CONTROL ACT OF 1944.

Both parties, the court below, and every other court to consider the question have assumed that the DOE act has merely reorganized the functions of two of the principal federal hydroelectric power acts, thus leaving their substantive and procedural provisions entirely unaffected.[10] We respectfully disagree. The answers to the two specific questions presented on this appeal, namely, whether the Secretary's trifurcated procedures comply with section 5 of the Flood Control Act of 1944 and with the terms of the 864 and 921 hydroelectric power contracts, depend partly on the wording of the statutes and partly on the intent of the Congresses that enacted them.

A. The Flood Control Act of 1944

The text of the Flood Control Act and the intent of the Congress that enacted it in 1944 must necessarily be the starting points for any inquiry into the meaning that must now be given to the operative phrase, "the

[10] The two major federal hydroelectric power statutes that contain the same bifurcated ratemaking procedures are the Flood Control Act of 1944 and its model, the 1937 Bonneville Project Act, 16 U.S.C. § 832e (1976 & Supp. IV 1980). The cases construing the acts are listed in the third-to-last paragraph of Part I.A, *supra*. *See also* Federal Columbia River Transmission System Act § 9, 16 U.S.C. § 838g (1976 & Supp. IV 1980) (same scheme).

rate schedules to become effective upon confirmation and approval by the Federal Power Commission." Flood Control Act § 5, 16 U.S.C. § 825s. We think that Congress's intent leaves virtually no room for doubt. Because the original Flood Control bill did not provide for the sale of hydroelectric power, what is now section 5 was added by the Senate. And the Senate Report, like the House Conference Report that followed, did nothing more than indicate that what became section 5 was an adoption of the scheme set out in section 6 of the Bonneville Project Act of 1937. *See* S.Rep. No. 1030, 78th Cong., 2d Sess. 3 (1944) (adding section 5 and explaining why it was needed); H.R.Rep. No. 2051, 78th Cong., 2d Sess. 7 (1944) (Conference Report). For guidance we must therefore look to section 6 of the Bonneville Project Act, which, exactly like the Flood Control Act, provides that rates "shall be prepared by the [appropriate Department of the Interior] administrator and become effective upon confirmation and approval thereof by the Federal Power Commission." Bonneville Project Act § 6, 16 U.S.C. § 832e (1976 & Supp. IV 1980).

Section 6 of the Bonneville Project Act was extensively discussed in various committees of both the seventy-fourth and seventy-fifth Congresses, and the question of who should have the power to set rates and why received especially close attention. The hydroelectric power provisions of the Act were drafted and recommended by a special Presidential commission chaired by Secretary of the Interior Harold L. Ickes called the National Power Policy Committee. Secretary Ickes's lucid and detailed explanation of the language that eventually found its way into both section 6 of the Bonneville Project Act and section 5 of the Flood Control Act is thus worth quoting in full:

> The Power Policy Committee suggested that the rate schedules should be prepared in the first in-

stance by the [Secretary of the Interior's Local Power] Administrator, because the fixing of rates during the early years at least will depend largely upon an informed judgment of potentially available markets which can be made only by a study at close range. Such study may, it would seem, be more effectively carried on under the direction of the Administrator on the spot than under the direction of the [Federal] Power Commission. On the other hand, it would be desirable that the Administrator's allocation of costs between the various purposes of navigation, flood control, irrigation, and power which might be served by a multiple-purpose project like Bonneville ..., the estimates of operating costs, and the policies to be pursued to develop the widest possible markets, might appropriately be *checked and audited by a national agency in the light of national policy*. The primary responsibility for the development of rate schedules adaptable to regional circumstances should be the Administrator's, but certain advantages might be obtained by having the rate schedules, after they are prepared by the Administrator, approved by a national agency as being in conformity with national policy.

Columbia River (Bonneville Dam), Oreg. and Wash.: Hearings Before the [House] Comm. on Rivers and Harbors ... on H.R. 7642, 75th Cong., 1st Sess. 143-44 (1937) (prepared statement of Secretary of the Interior Harold L. Ickes) (emphasis added). There appears to have been no doubt in anyone's mind that a Federal Power Commission review in light of "national policy" in part meant "the protection ... of all the users of surplus electric energy generated at [Federal] projects" from excessive rates. S. Rep. No. 2280, 74th Cong., 2d Sess. 2 (1936) (Report on S. 4695, 74th Cong., 2d Sess. (1936), a predecessor of H.R. 7642); H.R. Rep. No. 2955, 74th Cong., 2d Sess. 2 (1936) (report on H.R. 12873, also a 74th Cong., 2d Sess., predecessor of H.R.

7642); moreover, the statute itself reflects Secretary Ickes's expressed concern about the imposition of "undue cost[s] upon ... consumers," *Hearings on H.R. 7642, supra*, at 143 (remarks of Secretary Ickes), by providing that rates "shall be fixed and established with a view to encouraging the widest possible diversified use of electric energy." Bonneville Project Act § 6. *See also* Flood Control Act § 5 (rates shall be established "in such manner as to encourage the most widespread use [of federal power] at the *lowest possible rates* to consumers consistent with sound business principles") (emphasis added). We think that this wealth of detail and specificity from Secretary Ickes's congressional testimony is more than simply "probative." As chairman of President Roosevelt's National Power Policy Committee, Secretary Ickes was responsible for drafting what became section 6;[11] as Secretary of the Interior he was

[11] The peregrinations of what became section 6 require a footnote. The two bills recommended by the committees of the second session of the seventy-fourth Congress, S. 4695 and H.R. 12873, both placed *all* of the ratemaking function in the hands of the Federal Power Commission. This, however, was a departure from the language recommended by the eventual draftsmen, Secretary Ickes's National Power Policy Committee. At the same time, it was also the scheme preferred by the Federal Power Commission itself. *See* Letter from the Federal Power Commission to the House Rivers and Harbors Committee (May 3, 1937), *reprinted in Hearings on H.R. 7642, supra*, at 499-500. As a compromise, Secretary Ickes offered to give the Commission the power to revise rates, through the insertion of the following provision:

> If any rate schedule submitted by the Administrator is not approved by the Federal Power Commission, the Federal Power Commission may revise such schedule in conformity with the standards prescribed by this act, and as so revised such schedule shall become effective.

Hearings on H.R. 7642, supra, at 144 (remarks of Secretary Ickes, reading the proposed compromise amendment aloud to the Committee). When H.R. 7642 was reported out of the Committee, it duly included the above power-to-revise language. H.R. 7642,

also ultimately responsible for carrying its provisions into effect through his designee, the Bonneville Project Administrator (and eventually the Administrator of each PMA). We therefore conclude that Congress unmistakably intended that the Federal Power Commission apply its ratemaking expertise partly to protect consumers from undue rate increases instituted by the local power administrators. *See also Hearings on H.R. 7642, supra*, at 150 (colloquy between Secretary Ickes and Representative Culkin explaining desirability of giving rate review function to an "expert" Commission).

B. The DOE Act.

The next, and more important question is what, if any changes the 1977 Congress intended to make in the bifurcated scheme of the 1937 and 1944 Acts. We turn first to what the DOE Act says, and then to what those who wrote and enacted it intended.

1. The "Plain" Meaning of the Act

The "plain" meaning of the DOE Act presents a contradiction between two different theories, the "transferred but not changed" theory and the "deliberate amendment" theory. We think that even upon a bare reading of the statute the second of these is the more persuasive.

The case for the "transferred but not changed" theory at first seems appealing. The DOE Act actually

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75th Cong., 1st Sess. § 5 (1937), *Hearings on H.R. 7642, supra*, at 509, 512. *See* H.R. Rep. No. 1090, 75th Cong, 1st Sess. 3 (1937) (committee report recommending the bill). But then the power-to-revise language was deleted before this part of the bill, redesignated section 6, was finally considered by the full House. *See* H.R.Rep. No. 1507, 75th Cong., 1st Sess. 3, 5 (1937) (Conference Report) (setting out the full text of H.R. 7642, as revised). The Act therefore implements the original recommendation of Secretary Ickes's National Power Policy Committee.

says that its provisions were written in an effort to leave the then present law intact. Two sections are especially relevant. First, the "general transfers" section quoted above, DOE Act § 301(b), 42 U.S.C. § 7151(b), provides that the functions of the Federal Power Commission not expressly given to the FERC are "transferred to" the Secretary of Energy. And, as Tex-La has correctly pointed out, the word "transferred" necessarily precludes any notions of enlargement or expansion. Second, section 501 of the Act, entitled "Procedures," provides:

> If any provision of any Act, the functions of which are transferred, vested, or delegated pursuant to this Act, provides administrative procedure requirements in addition to the requirements provided in this title, such additional requirements shall also apply to actions under that provision.

DOE Act § 501(a)(1), 42 U.S.C. § 7191(a)(1). Since section 5 of the Flood Control Act on its face requires a bifurcated ratemaking procedure, it would seem that the quoted "procedural continuation" portion of section 501 would also require that this system remain unchanged.

We think, however, that upon closer examination the "transferred but not changed" theory collapses immediately and cannot be supported under any theory of statutory construction. We further believe that an understanding of what the 1977 Act actually did to the Flood Control Act leads unavoidably to the conclusion that the Secretary's present trifurcated ratemaking procedures are fully consistent with the demands of both statutes.

What the DOE Act actually did, as we have explained above, *see* Part I.A. *supra*, was give the Secretary of Energy both the Secretary of the Interior's authority to develop rates and the Federal Power Commission's authority to confirm and approve them. Tex-La and the government both agree, as they must,

that in the fifteen-month interval from October 1, 1977 (the effective date of the DOE Act), to January 1, 1979 (the effective date of the Secretary's delegation order), the Secretary of Energy arguably could have done almost anything to implement rates, so long as he complied with the "notice and comment" provisions of the Administrative Procedure Act.[12] The DOE Act thus carries within itself an obvious contradiction: while expressly providing that the administrative features of the Flood Control Act should continue unimpaired, the DOE Act, by unifying all ratemaking authority in the person of the Secretary of Energy, also makes it virtually impossible that this should be the case. If the 1977 Congress had truly wanted to preserve the pristinely independent Federal Power Commission review provided for in the Flood Control Act, it would not have unified rate authority in the Secretary. Without regulations[13] or a statute, a true separation of functions by definition cannot exist in one person.[14]

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[12] Because ratemaking is rulemaking, *see* APA § 5(c), 5 U.S.C. § 554(d)(1976), a full adjudicative hearing is not required. The provision in the APA that had exempted ratemaking for the sale of federally owned power from *all* provisions of the APA, APA § 4, 5 U.S.C. § 553(a)(2), was expressly overridden in section 501(b)(3) of the DOE Act, 42 U.S.C. § 7191(b)(3). The question of who has to give what kind of "process" when is treated in more detail in Part III, *infra*.

[13] The Secretary has promulgated such rules, now codified at 10 C.F.R. § 903 (1982); moreover, we think that he was under a statutory obligation to do so, *see* Part III, *infra*.

[14] Although FERC is part of the Department of Energy, it is independent. *See* DOE Act § 401, 42 U.S.C. § 7171. Similarly, the General Counsel's office of the NLRB is part of the Board, but it, too, is independent. *See* NLRA § 3(d), 29 U.S.C. § 153(d) (1976). The DOE Act, on the other hand, while retaining the Power Marketing Administrations as distinct organizational entities, places them under the complete control of the Secretary. *See* DOE Act § 302(a)(2), 42 U.S.C. § 7152(a)(2). There is no real independence at all, though in practice, of course, the Secretary could not possibly take the time to supervise closely the day-to-day affairs of each PMA. This "practical impossibility of close supervision" argument, however, could be made to apply to almost any complicated bureaucracy (whose subordinate members could hardly consider themselves "independent").

No one who accepts the basic outlines of the statutory and historical analysis presented in Part I.A of this opinion—Tex-La, the government, and the court in *Sam Rayburn Dam*, *supra*—has pretended not to see this obvious internal contradiction in the statute. The court's theory in *Sam Rayburn Dam* was that Congress simply made a mistake. *See Sam Rayburn Dam*, *supra*, typescript op. at 18 ("This Court readily concedes that it does not always understand the reasoning or logic behind all of the enactments by the Legislature, but it is the role of the judiciary to interpret and apply the laws and not to question the wisdom of those who made the laws."). Tex-La's theory is that although the statute may have inexplicably unified the two functions in the Secretary, the real mistake is his for having delegated away part of his power to the independent FERC (which he cannot control) instead of having invested it entirely in his own Assistant Secretary.

Having identified the internal contradictions in the DOE Act after a literal examination of its specific provisions, we are forced to turn to its general provisions, its overall purpose and design, in order to determine what the legislature must have intended. It is, as the Supreme Court has repeatedly pointed out, "a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Philbrook* v. *Glodgett*, 421 U.S. 707, 714, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975) (quoting *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)). *See* H. Hart & A. Sacks, *The Legal Process* 1415 (tent. ed. 1958) ("The whole context of a statute may be examined in aid of its

interpretation, and should be whenever substantial doubt about its meaning exists in the interpreter's mind, or is suggested to him."); *see also* F. Lieber, *Legal and Political Hermeneutics* 20 (3d ed. St. Louis 1880) (1st ed. Boston 1839) ("However minutely we may define, somewhere we needs must trust at last to common sense and good faith."). Recourse to a statute's overall purpose and design is, moreover, especially justified when the purpose of the statute is unambiguous.

As expressed in virtually every provision of title I ("Declaration of Findings and Purposes"), the purpose of the DOE Act is to improve the efficiency of American energy production and unite the scattered governmental divisions with responsibility in the area under the leadership of a single new cabinet-level officer, the Secretary of Energy. *See* DOE Act §§ 101-102, 42 U.S.C. §§ 7111-7112. *See also* S. Rep. No. 164, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad.News 854, 858 ("Under the Department of Energy, responsibility for the formulation of energy policy will be vested in a single official, the Secretary of Energy, who will be supported by a unified organization with the authority to direct Federal actions needed to implement that policy."); H.R.Rep. No. 539, 95th Cong., 1st Sess. 55 (1977), *reprinted in* 1977 U.S.Code Cong. & Ad.News 925, 925-26 (Conference Report) (same). In the eyes of Congress, divisions of authority—here, between the Secretary of the Interior and the Federal Power Commission—were a positive evil, something which the statute was designed to correct. Congress did not, in other words, unite the federal hydroelectric ratemaking authority of the Secretary of the Interior and the Federal Power Commission in the person of the Secretary of Energy by mistake. On the contrary, Congress seems to have done everything within its power to indicate that the unification was accomplished on *purpose*.

2. The Legislative History of the DOE Act.

The legislative history of the DOE Act reinforces this conclusion. Congress could not have been more explicit. Those who drafted the bill that became the DOE Act believed so strongly in the need for a highly centralized Energy Department with absolute control over the entire area that the original bill did not have any independent Federal Energy Regulatory Commission at all.

The first Secretary of Energy, Dr. James Schlesinger, was responsible for the final drafting and preparation of the bill for submission to Congress. *See S.* 826, 95th Cong., 1st Sess. (1977), *Department of Energy Organization Act: Hearing before the [Senate] Comm. on Governmental Affairs ... on S. 826*, 95th Cong., 1st Sess. 4 (1977); H.R. 4263, 95th Cong., 1st Sess. (1977), *Department of Energy Organization Act: Hearings before a Subcomm. of the [House] Comm. on Government Operations ... on H.R. 4263*, 95th Cong., 1st Sess. 2 (1977) (S. 826 and H.R. 4263 were the same bill). His original version created an independent "Board of Hearings and Appeals" that, as everyone came to understand it, had virtually no jurisdiction: the only cases that the Secretary had to refer to the Board were those "required by law to be made on the record after opportunity for an agency hearing." S. 826 & H.R. 4263 § 401(a)(2). Since ratemaking is rulemaking and thus by definition not subject to adjudicative hearing requirements, Dr. Schlesinger and his colleagues were forced to concede that if the Board were ever given anything much to do it would not be through the interpretation of the language of any statute. *See, e.g., Hearings on H.R. 4263, supra*, at 674 (remarks of FEA General Counsel Fygi). Thus all interstate gas and electric power regulation, public and private, was left to the absolute discretion of the Secretary of Energy. Secretary Schlesinger's articulated defense of this unprecedented concentration of power in the hands of an execu-

tive officer was that "pricing is an integral part of [energy] policy," and that the whole purpose of the proposed DOE Act was to centralize policymaking in one executive department. *Hearings on S. 826, supra*, at 151 (remarks of Dr. Schlesinger.)

In response to questions from the Senate committee, the Chairman of the Federal Power Commission confirmed that Dr. Schlesinger's contemplated centralization would effect a juncture of the two ratemaking functions set out in section 5 of the Flood Control Act and section 6 of the Bonneville Project Act:

> Now, in regard to the Bonneville and the Southwest[ern] and Southeast[ern] Power Administration[s], there is an example of where I believe greater coordination can be achieved. At the present time, [the] Department of the Interior proposes those rates, and the FPC confirms them.

Hearings on S. 826, supra, at 179 (remarks of FPC Chairman Dunham). Far from being overlooked or somehow forgotten, the two-stage ratemaking procedure at issue in the present case represented *specifically* the kind of inefficiency and fragmentation of authority that the DOE Act was designed to correct.

Introducing the bill in Congress, however, and actually getting it passed proved to be two entirely different matters. Led in part by Representative Moss of California, both the Senate and the House balked at vesting so much power in the hands of one officer of the executive department rather than in those of an at least nominally independent agency. In the Senate, Dr. Schlesinger's proposal never even made it out of committee. The version of S. 826 introduced on the Senate floor vested what amounted to all private energy pricing decisions in the hands of a newly strengthened independent Board. *See* S. 826, § 402, 123 Cong. Rec. 15,263 (1977). The Senators indicated that the new arrangement represented a political compromise worked

out in committee. *See* 123 Cong. Rec. 15,278, 15,280, 15,281 (1977) (remarks of Sens. Jackson, Glenn & Javits). The House version of the bill, now redesignated H.R. 6804, emerged from committee relatively unscathed, *see* H.R. 6804, 123 Cong. Rec. 17,282 (1977), but quickly met a similar fate at the hands of Representative Moss during the floor debates. *See* 123 Cong. Rec. 17,302-10 (debate and adoption of the so-called Moss Amendment). When both Houses eventually agreed upon the Senate version, S. 826, Representative Moss expressed his satisfaction and remarked, "Under the language reported by the Conferees, the Federal Energy Regulatory Commission will exercise all but a very small portion of the functions now vested in the Federal Power Commission." 123 Cong. Rec. 26,119 (1977). *See* S. Rep. No. 367, 95th Cong., 1st Sess. 76 (1977) (second Conference Report) (listing some of the FPC powers not transferred to the FERC). The allocation of ratemaking power between the Secretary and the FERC thus represented a deliberate compromise, the result of the political balance of power during the first session of the ninety-fifth Congress.

The legislative history further indicates that the asserted discrepancy between the "transferred but not changed" theory as expressed in section 501(a)(1) and what the statute actually accomplishes was inadvertent. Congress intended this clause to apply to the *substance* of the technical procedural requirements, and not to the identity of the agencies responsible for implementing them. *See* H.R. Rep. No. 539, 95th Cong., 2d Sess. 81 (1977), *reprinted in* 1977 U.S.Code Cong. & Ad.News 925, 952. For example, if the Flood Control Act had required hearings on the record, the Secretary would have been forbidden from abolishing those adjudicative procedures. *Id.* At the same time, the weakening of consumer protection through the elimination of bifurcation was considered to be a necessary price to

pay for improved administrative efficiency. The point is that Congress wished to avoid making any "substantive" changes in the law, and for their purposes "substantive" included hearing and other requirements that most lawyers in normal contexts would have termed procedural. *See id.*; 123 Cong.Rec. 17,264-65 (1977) (colloquy between Reps. Brooks & Eckhardt). Congress did recognize that the same theoretical protection could be worth a very great deal before an independent administrative agency like the Federal Power Commission and hardly anything before an officer of the executive department, *see Hearings on H.R. 4263, supra*, at 674 (questioning conducted by Rep. Moss), but the result was the Moss compromise—which does not include federal hydroelectric power ratemaking.

Though it is not drafted as happily as it might have been, the political ratemaking compromise reached by the ninety-fifth Congress is adequately expressed in the statute and rationally explained in the legislative history. We therefore think that we are required to enforce it.

Like Tex-La, the government, and the court in *Sam Rayburn Dam, supra*, we realize that the provisions of the DOE Act apparently do partially conflict with one another. But unlike Tex-La, the government, and the court in *Sam Rayburn Dam*, we believe that the solution to the problem is not to act as though it did not exist, or to give effect to the "transferred but not changed" theory at the expense of the general provisions, the legislative history, and even common sense; rather, we believe that we are required to give effect to the statute's obvious purpose and operative provisions, even if we must do so at the expense of literal compliance with the "transferred but not changed" theory.

Because of the apparent contradiction in the statute, it is impossible for any court to give effect to every provision. We must make a choice. Being forced to do so,

we have no trouble in doing what makes the most sense and what best carries out the clearly expressed intention of the legislature. Despite the implicit expression of the "transferred but not changed" theory in section 301(b) and 501(a)(1) of the Act, we hold that the unification of the two Flood Control Act functions in the hands of the Secretary in effect amends section 5 of the Flood Control Act to alter the strict procedural requirement of a bifurcated rate implementation scheme.

This conclusion disposes of part of the case. The parties have conceded, as again they must,[15] that the 864

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[15] The constitutional prohibition against the enactment of ex post facto laws applies only to criminal statutes. *See, e.g., Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594-95, 72 S.Ct. 512, 521-22, 96 L.Ed. 586 (1952). The obligations clause applies only to state enactments. *See* U.S. Const. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts.") Since a court must apply the law as it exists at the time of its decision, *see, e.g., Bradley* v. *School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974), the only contractual or constitutional restriction that could apply to the DOE Act's effect on contracts written under the Flood Control Act would be the due process clause. *See, e.g., Sinking Fund Cases*, 99 U.S. 700, 718-19, 25 L.Ed. 496 (1879); *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir. 1977)(effect of subsequently promulgated arbitration requirements on prior inconsistent contractual provision). *See generally* 1 J. McBride & T. Touhey, *Government Contracts* § 1.20[3] (1978 & Supp. 1982) (subsection entitled "Abrogation of Vested Rights"). This case does not involve the imposition of a rate increase where the contract forbade such increases; rather, the DOE Act merely instituted a slight procedural change in how the new rates were to go into effect. And as both parties concede, "interim" rates have always been lawfully imposed under the Flood Control Act as it was interpreted before the 1977 Act went into effect. *See* Part I[illegible], *infra*. We do not address the question of whether Tex-La could have successfully challenged the rate of interest given, had it been necessary to return interim rate collections. *Cf.* 18 C.F.R. § 300.20(c)(3) (1982) (level of interest rates for BPA interim rate

and 921 contracts should be read to reflect subsequent procedural statutory amendments. 524 F.Supp. at 419; 3 Record at 26, 32 (Case No. 81-3715). The two contracts track, and in effect incorporate by reference, the language of section 5 of the Flood Control Act. Since the procedural requirements of section 5 have been altered by the DOE Act, the two contracts should be read accordingly, i.e., as permitting the imposition of interim rates, subject to refund with interest, by the Secretary of Energy. As we shall now show, the only limitation on the Secretary's authority is that his procedures must carry out, insofar as possible, the directives of both applicable statutes.

III. TRIFURCATION AND THE SECRETARY'S REGULATIONS

In an attempt to reconcile the conflicting elements of the DOE Act, the Secretary of Energy has codified his December, 1978, delegation order and promulgated regulations to preserve, as nearly as possible, the two-stage review process described in section 5 of the Flood Control Act of 1944. We think that he has done all that he reasonably could do to carry out his statutory mandate, and that his trifurcated ratemaking procedures if anything err on the side of affording power customers too much procedural protection. And this, surely, is all that the two hydroelectric power contracts require.

The following analysis will focus on the administrative realities of federal hydroelectric ratemaking. Contemporaneous or near contemporaneous administrative practices often figure very importantly in the interpretation of an ambiguous statute. *See, e.g., E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55, 97 S.Ct. 2229, 2234, 53 L.Ed.2d 100 (1977) (citing cases). In order to determine the purpose and practical effect

refunds under the Bonneville Power Act and the Pacific Northwest Electric Power Planning and Conservation Act.)

of the bifurcated ratemaking mechanism, the key question then becomes *who* is required by *what* to give *how much* "process" *when*. In the years since the middle 1940s, when the PMAs and the Federal Power Commission first began working together, the answers to this question have changed dramatically.

A. Past Administrative Practice and Interpretation

Until relatively recently, the several Power Marketing Administrations were not required to and did not afford their customers any kind of formal "process" at all. *See, e.g., United States Department of the Interior, Southeastern Power Administration, Docket No. E-7002*, 54 F.P.C. 3 (1975); *United States Department of the Interior, Bonneville Power Administration, Docket No. E-8978*, 52 F.P.C. 1912 (1974); *BPA, No. E-6611, supra*, 34 F.P.C. at 1462 (1965); *Southwestern Power Administration, Docket No. IT-5971*, 6 F.P.C. 407 (1947). Because there were no statutes, rules, or even unwritten practices or customs requiring hearings, power customers were entirely unprotected by any procedural safeguards in the initial stage of the ratemaking process. A customer was fortunate even to participate in informal, off-the-record discussions with the relevant PMA before a new rate schedule was submitted to the Commission for confirmation and approval. *See BPA, No. E-6611, supra*, 34 F.P.C. at 1464 (informal "conferences" held). There was not even the opportunity for the kind of "notice and comment" proceedings common in most ratemaking cases.

The second stage of the process—"confirmation and approval" from the Federal Power Commission—was therefore inordinately important. The Commission did give published notice and afford the opportunity for more formal oral hearings.[16] The Commission's dedica-

[16] To explain why it did so requires a short detour. Although most ratemaking is subject to the notice and comment provisions

tion to the principle of full and public administrative hearings under the Bonneville Project Act and the Flood Control Act was unambiguous. "This Commission," according to one per curiam opinion, "believes that it is appropriate and in the public interest to discharge its duties and responsibilities under the Bonneville Project Act and the Flood Control Act of 1944 *on the basis of evidentiary records which are developed during the course of public hearings.*" *United States Department of the Interior, Bonneville Power Administration, Docket No. E-8978*, 54 F.P.C. 808, 810 (1975) (emphasis added). The Commission's reviewing procedures under section 5 of the Flood Control Act and section 6 of the Bonneville Project Act were lengthy, careful, and designed to afford power customers every imaginable procedural safeguard.

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of section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1976), the sale of public property, such as hydroelectric power, is specifically exempted. *See* APA § 4, 5 U.S.C. § 553(a)(2); *City of Santa Clara* v. *Andrus*, 572 F.2d 660, 673 (9th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978); *Associated Electric Cooperative, Inc.* v. *Morton*, 507 F.2d 1167, 1177-78 (D.C.Cir. 1974), *cert. denied*, 423 U.S. 830, 96 S.Ct. 49, 46 L.Ed.2d 47 (1975). The exemption, however, was designed not to discourage agencies from "adopt[ing] voluntary public rule making procedures where useful to the agency or beneficial to the public," but rather to leave the question of whether to adopt formal procedures entirely up to the agency's good judgment. S.Rep. No. 752, 79th Cong. 1st Sess. 199 (1945) (legislative history of the APA). The Federal Power Commission accordingly adopted the practice, eventually codified in the Code of Federal Regulations, of holding not merely "notice and comment" proceedings, but full, adjudicatory hearings with cross-examination of witnesses. *See* 18 C.F.R. § 2.1(a)(1)(vi)(A)(1973) (superseded) (required publication of notice in the Federal Register, thereby invoking Commission's full "rules of practice"); *United States Department of the Interior, Bonneville Power Administration, Docket No. E-9563*, 58 F.P.C. 2498, 2500 (1977) (formal hearing ordered before ALJ, which, under 18 C.F.R. § 1.20(g)(1) (1977) (superseded), entails right of oral cross-examination of witnesses); *SEPA, No. E-7002, supra*, 54 F.P.C. at 3 (same, invoking 18 C.F.R. § 1.20 (superseded)); *BPA, No. E-8978, supra*, 52 F.P.C. at 1912-13 (same, invoking 18 C.F.R. § 1.20 (superseded)); *BPA, No. E-6611, supra*, 34 F.P.C. at 1465 ("presentations," presumably as that word is defined in 18 C.F.R. § 1.20(g)(1) (superseded), made before full Commission, and not just ALJ); *but cf. SWPA, No. IT-5971, supra*, 6 F.P.C. at 408 (full hearing not granted because rates approved were only "temporary," and were to go into effect on an "interim basis" only).

The Federal Power Commission's substantive review was equally careful and painstaking. Although the New Deal image of the apolitical, expert, and therefore deservedly autonomous agency has long since been questioned, *see, e.g.*, DeLong, *Models of Regulation*, 80 Mich.L.Rev. 885, 886-89 (1982) (summarizing the literature); Stewart, *The Reformation of American Administrative Law*, 88 Harv.L.Rev. 1669 (1975) (leading analysis), the Federal Power Commission did its best to fulfill the ideal. Its reviewing function under section 5 of the Flood Control Act and section 6 of the Bonneville Project Act did not in any way resemble the "hands off" kind of review often undertaken by courts of appeals. When urged to adopt this limited reviewing function, the Commission expressly rejected it and commented:

> Our jurisdiction ["within the framework of the Bonneville Act and the Flood Control Act"] . . . can neither be analogized to an independent rate investigation [under the Federal Power Act] *nor to the appellate function of United States Courts of Appeals* over Commission decisions under the Federal Power Act. It evolves from a unique relationship between the Department of the Interior, a part of the Executive Branch, with managerial and ratemaking expertise over its projects, and, the Federal Power Commission, an independent agency of the Congress with special expertise in ratemaking. In establishing this relationship Congress did not limit us to the function of assuring that the Secretary had complied with the bare legal

> requirements of the statute[s]. It expected us to apply our independent expertise in evaluating the rates set by the Secretary.

BPA, No. E-6611, supra, 34 F.P.C. at 1465 (emphasis added). *See United States Department of the Interior, Southwestern Power Administration, Docket No. E-6943*, 56 F.P.C. 795, 802 (1976) (same); *BPA, No. 8978, supra*, 54 F.P.C. at 811 (same). Aided by full adjudicatory proceedings, and backed by a staff with special expertise in ratemaking, the Commission understood that it was required to undertake a substantive inquiry into the nuts and bolts of the federal hydroelectric power ratemaking process. The Commission's review under section 5 of the Flood Control Act and section 6 of the Bonneville Project Act was therefore both procedurally and substantively exhaustive.

B. Present Administrative Practice and Interpretation.

The situation today is completely different. The "confirmation and approval" function, now exercised by the FERC, is considerably less than what it once was; conversely, the full panoply of procedural protections afforded complainants before the several PMAs in some ways rivals even what the old Federal Power Commission used to do.

The self-imposed limitations of the FERC on its reviewing authority under section 5 of the Flood Control Act and section 6 of the Bonneville Project Act have been formally set out and explained in three recent opinions. In the first case to arise under either act after the passage of the DOE Act, the FERC said, "The Commission emphasizes that its role here is in the nature of an appellate body." *BPA, No. EF80-2011, supra*, 45 Fed.Reg. at 79,547. This is exactly the opposite of what the Federal Power Commission had said in the long passage just quoted. *BPA, No. E-6611, supra*, 34 F.P.C. at 1465. The justification for the about-face appears to be that, with the improvement in the procedures before the PMAs, extensive appellate proceedings are no longer cost-justified. *See United States Secretary of the Interior, Bonneville Power Administration, Docket No. E-9563*, 45 Fed. Reg. 80,882, 80,883 (FERC 1980).[17] *See also SWPA, No. EF79-4011, supra*, 46 Fed. Reg. at 30,878 (case at bar) (citing Nos. EF80-2011 & E-9563, *supra*, as controlling).

The recent procedural developments within the PMAs have indeed been dramatic.[18] Although SWPA has always "follow[ed] an informal practice on a case-by-case basis" according to no particular rules, 45 Fed.Reg. 86,976, 86,976 [sic] (1980) (description of prior procedural practices), formal rules were recently tested (as in the case at bar) and officially promulgated at the end of 1980. *See* 10 C.F.R. § 903 (1982). The rules require extensive public hearings, begining with "public information forums," 10 C.F.R. § 903.15, and culminating with non-adjudicative "public comment forums," 10 C.F.R. § 903.16. Although not adjudicative hearings in the sense of section 1.20 of the old Federal Power Commission's rules of practice, *see* 18 C.F.R. § 1.20 (1977) (superseded), the new public hearings

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[17] This case, *BPA, No. E-9563*, was actually decided under section 9 of the Federal Columbia River Transmission System Act, 16 U.S.C. § 838g (1976 & Supp. IV 1980), which provides that rates "shall become effective upon confirmation and approval thereof by the Federal Power Commission." This section of the Act copies section 6 of the Bonneville Project Act and was intended to place in effect precisely the same scheme, governed by precisely the same legal standards. *See* H.R. Rep. No. 1375, 93d Cong., 2d Sess. 5 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5810, 5814 (1974) (section 9 "preserves the existing requirement of law that rate schedules prepared by BPA must be approved by the Federal Power Commission before they become effective").

[18] This discussion does not include the Bonneville Power Administration, which had peculiar procedural rules imposed upon it by statute in 1980. *See* Part IV.B, *infra*.

nevertheless seem to provide all that could be desired in the way of procedural protection.[19]

The substantive quality of the new "interim rate" intermediate review by the Assistant Secretary also seems to be more than adequate. Although things may change with time, we have been given no reason to suspect at this juncture that his review is a mere sham or rubber stamp. He depends procedurally, of course, on the record made in the public proceedings before the relevant PMA, but his judgment as a higher ranking officer in the Department of Energy than the regional PMA administrator remains independent.[20] Still, the Assistant Secretary and the PMA administrator remain answerable to one person, the Secretary of Energy, and are hence at least in that sense not as independent from each other as was the Federal Power Commission (answerable to Congress) from the Secretary of the Interior (answerable to the President). One could therefore reasonably claim that the current interim rate review has somehow lost the true independence present in the old system.

We think, however that whatever lingering doubts that might exist about the substantive adequacy of the Assistant Secretary's review are resolved by the provi-

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[19] The parties essentially agree on this point, as it seems they must after *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (procedural dictates of the APA control). Note that the provision exempting federal hydroelectric power ratemaking from *all* of the procedural requirements of the APA has been expressly overridden. *See* note 12, *supra*.

[20] Although counsel for the government has asserted that the reduction from a 42 percent to a 33 percent rate increase was made by the Assistant Secretary, our reading of the printed record indicates that it was SWPA itself that made the reduction, not the Assistant Secretary. *See Appropriation Hearings*, *supra* Part I.B, at 2997 (indirect statement to that effect); *SWPA, Order SWPA-1*, *supra*, 44 Fed.Reg. at 13,069 (same).

sion for a final administrative review before the FERC. In this case justice delayed is most definitely not justice denied. Rates are very carefully reviewed by the PMA itself after the various public proceedings and by the Assistant Secretary before rates go into effect at all. Then, if the FERC nevertheless determines that certain of the rates are unjustifiably high, the overcharges are returned with interest.[21] Given both the considerable confusion in the DOE Act about the continued existence of the bifurcated procedures of the Flood Control Act and the uncertainties of the modern American economy, the Secretary seems to have gone to considerable lengths to devise regulations that would keep rates current in as fair a way as possible.

This analysis leads us to conclude that the first two stages in the trifurcated procedures set out in section 903 of the Secretary of Energy's regulations—which must be fully complied with before rates go into effect even on an interim basis—fully meet the "process" concerns of those who originally designed and enacted the bifurcated ratemaking procedure set out in section 5 of the Flood Control Act. Correlatively, we do not think that the somewhat minimal benefits conferred by the FERC's new watered-down review procedures, especially when weighed against the substantial cost to the government of delay, are worth what in the present case was a twenty-seven month wait. (Any excessive charges are not absconded with, but are returned *with interest*.) We similarly believe that the present procedures more than meet the "excessive rate" concerns of those who, using the Flood Control Act's language as a model, drafted the 864 and the 921 contracts at issue in this case. Any other conclusion would require us to shut

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[21] The rate of interest is not specified, but the BPA, which now has separate and peculiar regulations of its own, gives its overcharged customers the same rate of interest that it itself must pay when it borrows. *See* 18 C.F.R. § 300.20(c)(3) (1982).

our eyes to the administrative realities—which we refuse to do. The Secretary's current interim rate implementing procedures are sound in policy and do as much as anyone could reasonably expect in reconciling the conflicting textual demands of the Flood Control and DOE Acts.

IV. CONGRESSIONAL RATIFICATION AND THE PROBLEM OF "INTERIM" RATES.

The parties have raised three subsidiary arguments that remain to be addressed. All of them concern the "interim" nature of the present rates. Although we think that the parties have made much ado about relatively little, the arguments nevertheless deserve a careful treatment, first, because their consideration has, in part, led us to the result we reach today, and second, because they have been accepted by some courts.

A. The Four FPC Interim Rate Cases

As both parties point out, the Federal Power Commission before it was abolished issued at least four "interim" rate orders under section 5 of the Flood Control Act and section 6 of the Bonneville Project Act. *United States Department of the Interior, Bonneville Power Administration, Docket No. E-9563*, 58 F.P.C. 2498 (1977); *SEPA, No. E-7002, supra*, 54 F.P.C. at 3; *BPA, No. E-8978, supra*, 52 F.P.C. at 1912; *SWPA, No. IT-5971, supra*, 6 F.P.C. at 407. Although these cases do show that the Federal Power Commission recognized the usefulness and legality of interim rates, they shed relatively little light on the present case.

Once the Secretary of the Interior developed rates and submitted them to the Commission for approval, the Commission had what amounted to plenary rate implementation authority. Since the Commission was under no legal obligation to hold any kind of hearings whatsoever, *see* note 16 *supra*, it clearly had the inher-

ent administrative authority to implement interim rates virtually immediately. The Supreme Court has upheld this kind of ratemaking authority on a number of occasions. *See Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 83 S.Ct. 211, 9 L.Ed.2d 199 (1962) (holding that once there is plenary rate implementation authority, there must necessarily also be implied interim authority); *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037 (1942) (same); *The New England Divisions Case*, 261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605 (1923) (same, leading case). Neither the Bonneville Project Act nor the Flood Control Act imposed a requirement that implemented rates be somehow "final." Tex-La and the government have each conceded that dicta in two recent lower court decisions to the contrary is simply mistaken, and we agree. *City of Fulton, supra*, 680 F.2d at 120-21; *Sam Rayburn Dam, supra*. The Federal Power Commission had final and plenary authority over rate implementation. A fortiori, under *Tennessee Gas* it could use only part of that authority and approve rates for an interim period. *See also* S. Rep. No. 272, 96th Cong., 1st Sess. 31 (1979) ("The Committee recognizes that prior to the Department of Energy Organization Act, the Federal Power Commission exercised interim rate approval authority with respect to the Administrator's rates.").

The issue in the present case is not whether interim rate authority exists but rather, given that it exists, who shall exercise it under the DOE Act. Tex-La's argument that interim rate authority must be exercised by the same administrative body as that which has the final authority is predicated upon the false assumption that the DOE Act did not modify the bifurcated procedure of the Flood Control Act.[22] We have explained our

[22] Tex-La also argues that the Assistant Secretary's interim

reasons for rejecting this assumption in the first three Parts of this opinion.

B. Congressional Ratification of the Delegation Order

In 1980 Congress in effect modified section 6 of the Bonneville Project Act by enacting the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839 to 839h (Supp. IV 1980) ("Pacific Power Act"). In so doing, it considered and partly rejected the Secretary of Energy's trifurcated ratemaking procedures. The parties vigorously urge that these recent

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rate approval was somehow not "final" within the meaning of both the Flood Control Act and the two hydroelectric power contracts. Given the passage of the DOE Act, the "final" requirement of the Flood Control Act is, in essence, a false issue and has been disposed of in Part II, *supra*.

The use of the word "final" in one of the power contracts is more problematical. Tex-La assumes without argument that the word should be interpreted according to its usual meaning in the judicial review of agency action cases, i.e., that "final" somehow embraces either the notion of administrative exhaustion or that of an unmodifiable order. Under this interpretation, rates could not be raised until such "final" administrative action has occurred—confirmation by the FERC. Again, we think that the 921 (as well as the 864) contract was written to do nothing more than track the language of section 5 of the Flood Control Act, which has been amended by the DOE Act.

We do not, in any event, think that the draftsmen had in mind anything like the "exhaustion" requirements that a court must consider in reviewing action taken by an administrative agency; we similarly do not think that they were concerned with the question of possible mootness that troubles a court when it reviews an administrative order that is still subject to modification. Even without the DOE Act's changes in the Flood Control Act, the various administrative review or "finality" cases that Tex-La cites would be inapposite. *See, e.g., McKart* v. *United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969) (finality in sense of administrative exhaustion); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 554, 82 S.Ct. 1459, 1474-75, 8 L.Ed.2d 671 (1962) (finality in sense of non-modifiability required in order to avoid possibility of rendering advisory opinion).

congressional deliberations should influence our decision today but—quite apart from the somewhat dubious propriety of relying upon this kind of post hoc "legislative history"—we have found the deliberations neither very helpful nor applicable to the present case. The deliberations do, however, highlight some of the policy problems involved in federal hydroelectric power interim ratemaking, and we have carefully considered them before reaching our decision today.

As enacted after considerable debate, section 7(i)(6) of the Pacific Power Act, 16 U.S.C. § 839e(i)(6), gives the Act's interim rate authority to the FERC, which was required to issue regulations for that purpose within one year. *See* 18 C.F.R. § 300 (1982). In order to fill the contemplated one-year gap before the FERC could promulgate its interim rate regulations, section 7(i)(6) also authorized the Secretary of Energy "to approve such interim rates during such one-year period in accordance with the applicable procedures followed by the Secretary prior to the effective date of this Act." Pacific Power Act § 7(i)(6), 16 U.S.C. § 839e(i)(6). The Secretary's one-year authority, and its ultimate vesting in the hands of the FERC, is significant for two reasons.

First, Congress clearly understood and approved of the Secretary's exercise of the interim ratemaking function under his December, 1978 delegation order. As the Chairman of the House Energy and Commerce Committee explained to his colleagues on the House floor, the Act "authorizes the Secretary of Energy to approve . . . rates on an interim basis during [the] 1-year period in accordance with the applicable procedure followed by the Secretary at the present time for such interim approvals." 126 Cong. Rec. H10685 (daily ed. Nov. 17, 1980) (remarks of Rep. Dingell). *See also* 126 Cong.Rec. H9854 (daily ed. Sept. 29, 1980) (remarks of one of the principal sponsors, Rep. Swift) ("[T]he Sec-

retary of Energy may, as he does today, grant ... interim approval ....”). It is therefore indisputable that the ninety-sixth Congress-which was only one Congress removed from the ninety-fifth that passed the DOE Act—fully recognized at least the bare legality of the Secretary's trifurcated ratemaking procedures.

The second important point, as Tex-La has correctly observed, is that even though the ninety-sixth Congress thought that the Secretary's December, 1978 trifurcation order was legal, it also thought that its interim ratemaking procedure was unwise. The original bill as recommended by the Senate, S. 885, 96th Cong., 1st Sess. § 7(a), S. Rep. No. 272, 96th Cong., 1st Sess. 9 (1979), and considered by the House, S. 885, 96th Cong., 2d Sess. § 7(i)(6), H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. 1, at 19 (1980), vested interim ratemaking authority *entirely* in the FERC. The rationale seems to have been the same as that advanced over forty years earlier by Secretary Ickes's original National Power Policy Committee: rates should not go into effect until “after substantive review” by an independent agency. H.R.Rep. No. 976, 96th Cong., 2d Sess, pt. 1, at 81 (1980), *reprinted in* 1980 U.S.Code Cong. & Ad.News 5989, 6017 (minority committeemen expressing satisfaction with this aspect of the bill). The Secretary's vigorous defense of his already existing interim rate implementation procedures was to no avail, Letter from the Department of Energy to the House Subcommittee on Water and Power (March 11, 1980), *reprinted in* H.R.Rep.No. 976, 96th Cong., 2d Sess., pt. 2, at 60-63 (1980), *and in* 1980 U.S. Code Cong. & Ad. News 6058-61, and resulted only in the eventual ratification of his existing procedures for the temporary interval after the effective date of the Act and before promulgation of regulations by the FERC, *See* S. 885, 96th Cong., 2d Sess. § 7(i)(6), H.R.Rep. No. 976, 96th Cong.,2d Sess.,pt. 2, at 20 (1980) (this is still a third

version of the bill S. 885; the enacted language tracked yet a fourth version that imposed the one-year time limit for the FERC to promulgate its regulations).

The Pacific Power Act, in short, has created a deliberate difference between the Bonneville Power Administration's rate implementation procedures and those of the other four PMAs. (The BPA is also now required to permit some oral cross-examination during its public hearings.) In changing the status quo for the BPA, Congress appears to have shown no marked unhappiness with what is going on in the other four PMAs. If anything, we think that this supports the result that we have reached.

C. Implied Rate Implementation Authority

The parties, finally, have vigorously argued about the effect of the DOE Act's boiler-plate “necessary and proper” clause, DOE Act § 644, 42 U.S.C. § 7254, and about the DOE Act's incorporation by reference of the Natural Gas Act's similar boiler-plate “necessary and proper” clause, DOE Act §§ 302(b), 402(a)(2), 42 U.S.C. §§ 7151(b), 7172(a)(2). *See* Natural Gas Act of 1938, § 16, 15 U.S.C. § 717o (1976 & Supp. IV 1980). *See also* Federal Power Act of 1935, § 309, 16 U.S.C. § 825h (1976 & Supp. IV 1980) (same kind of provision, also incorporated by reference into the DOE Act). The problem arises because the Supreme Court has definitively held that this kind of clause, and section 16 of the Natural Gas Act in particular, contains an implied authority to issue interim rate orders. *See, e.g., Federal Power Commission v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 83 S.Ct. 211, 9 L.Ed.2d 199 (1962).

We reject the above arguments for the Secretary's exercise of an interim rate authority essentially for the same reasons that the court below rejected them. The Natural Gas Act, like most modern ratemaking statutes, provides for a plenary ratemaking authority and vests in it one body, there, the Federal Power Commis-

sion. As the Supreme Court held in *Tennessee Gas*, an interim authority follows naturally from a plenary authority under the usual "necessary and proper" clause. What the government has failed to understand in urging upon us a similar argument in the present case is that such a holding necessarily depends upon the existence of a plenary authority. In this case the rate developer has none; the scheme set out in section 5 of the Flood Control Act of 1944 *divides* rate authority and vests it in two separate branches of the government. The government's suggested approach assumes the validity of the conclusion even before the process of deduction has begun. *But see Montana Power Co.* v. *Edwards*, 531 F. Supp. 8 (D. Or. 1981) (adopting the approach attacked in this paragraph); *Pacific Power & Light Co.* v. *Duncan*, 499 F.Supp. 672 (D.Or.1980) (same); *but cf. Colorado River Energy Distributors Ass'n* v. *Lewis*, 516 F.Supp. 926 (D.D.C.1981) (correctly relying on *Tennessee Gas* in hydroelectric ratemaking case under section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (1976), which gives the Secretary plenary authority). To resolve this case, we are forced to examine the substantive provisions of the Flood Control and DOE Acts, which we have done in the first three Parts of this opinion.

V. CONCLUSION

The various provisions of the two acts do seem to conflict with one another. Those responsible for the design of the scheme embodied in section 5 of the Flood Control Act of 1944—Secretary of the Interior Harold Ickes's National Power Policy Committee of 1937—originally placed the rate development and rate approval functions in separate hands in order to guarantee that rates would be "appropriately . . . checked and audited by a national agency in the light of national policy." *Hearings on H.R. 7642*, *supra*, at 144. While in effect stating that these two functions were transferred but

not changed, DOE Act §§ 302(b), 501(a)(1), the Department of Energy Organization Act also transferred both functions to the Secretary of Energy alone. Some change, we submit, is therefore unavoidable. The architects of the bifurcated scheme in section 5 of the Flood Control Act (and in section 6 of the Bonneville Project Act) presumably did not intend that rate development and the requisitely independent "check and audit" could both be done by one man, or even one department. Thus, the conflict between the provisions in the DOE Act is patent, and must be forthrightly addressed.

We think that the Secretary of Energy, through his delegation order of December, 1978, has resolved the conflict in the statute as best he reasonably could. He has delegated rate development to the local Power Marketing Administrations, rate approval and interim implementation to his own Assistant Secretary, and final approval to the independent agency, the FERC. This trifurcated arrangement does as much as possible to resolve the Flood Control Act's command that there be an *independent* check on ratemaking, and the DOE Act's command that ratemaking be made more efficient through the centralization of control in one officer, the Secretary of Energy.

The two hydroelectric power marketing contracts in this case each track the language of the Flood Control Act and therefore also contemplate that its bifurcated procedures will be used when rates are raised. The DOE Act has slightly altered this statutory procedure, but since the parties have conceded that contracts should be read to incorporate subsequent statutory alterations,[23] we hold that the Secretary of Energy is entitled to use the new trifurcated procedures in raising rates under the two contracts.

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[23] *See* note 15, *supra*, and accompanying text.

We wish to underscore, finally, that a conclusion contrary to the one that we have reached today would be difficult to justify on almost any terms except the most literal. A contrary conclusion would mean that the DOE Act's unification of the rate development and rate confirmation functions in the Secretary of Energy would have produced, after the trifurcation of the delegation order, a most unlikely result: the Secretary's current trifurcated scheme would have been struck down because it gave litigants *too much* "process" by giving them one last, truly independent review before the FERC. (No one disputes that before the delegation order the whole ratemaking authority could have been exercised by the Secretary or an Assistant Secretary alone.) Whatever the role of common sense in interpreting the oftentimes somewhat mystifying pronouncements of the legislature, we think that at the very least it requires searching study and careful consideration before we strike down a scheme that gives the complainants *too much* process. Such a result is, in any event, unecessary here and we reject it absolutely.

REVERSED.

APPENDIX F

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 5 of the Flood Control Act of 1944, 16 U.S.C. (1976 ed.) 825s, provides:

> Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

2. Section 301(b) of the Department of Energy Organization Act, 42 U.S.C. 7151(b), provides:

> Except as provided in subchapter IV of this chapter, there are hereby transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 7172(a)(2) of this title to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence.

3. Section 302(a) of the Department of Energy Organization Act, 42 U.S.C. 7152(a), provides in pertinent part:

> (1) There are hereby transferred to, and vested in, the Secretary all functions of the Secretary of the Interior under section 825s of Title 16, and all other functions of the Secretary of the Interior, and officers and components of the Department of the Interior, with respect to—
>
> (A) the Southeastern Power Administration;
> (B) the Southwestern Power Administration;
> (C) the Alaska Power Administration;
> (D) the Bonneville Power Administration including but not limited to the authority contained in the Bonneville Project Act of 1937 and the Federal Columbia River Transmission System Act;
> (E) the power marketing functions of the Bureau of Reclamation, including the construction, operation, and maintenance of transmission lines and attendant facilities; and
> (F) the transmission and disposition of the electric power and energy generated at Falcon Dam and Amistad Dam, international storage reservoir projects on the Rio Grande, pursuant to the Act of June 19, 1954, as amended by the Act of December 23, 1963.
>
> (a)(2) The Southeastern Power Administration, the Southwestern Power Administration, the

> Bonneville Power Administration, and the Alaska Power Administration shall be preserved as separate and distinct organizational entities within the Department. Each such entity shall be headed by an Administrator appointed by the Secretary. The functions transferred to the Secretary in paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) shall be exercised by the Secretary, acting by and through such Administrators. Each such Administrator shall maintain his principal office at a place located in the region served by his respective Federal power marketing entity.

4. Section 501(a)(1) of the Department of Energy Organization Act, 42 U.S.C. 7191(a)(1), provides in pertinent part:

> If any provision of any Act, the functions of which are transferred, vested, or delegated pursuant to this chapter, provides administrative procedure requirements in addition to the requirements provided in this subchapter, such additional requirements shall also apply to the actions under that provision.

5. Department of Energy *Delegation Order No. 0204-33*, 43 Fed. Reg. 60636 (1978), provides:

> Pursuant to the authority vested in me as Secretary of Energy and by Sections 203(b), 301(b), 302(a), 402(e), 641, 642, 643 and 644 of the Department of Energy Organization Act (Pub. L. 95-91):
>
> 1. There is hereby delegated to the Assistant Secretary for Resource Applications the authority to develop, acting by and through the administrators, power and transmission rates for the power marketing administrations, and the authority to confirm, approve and place in effect such rates on an interim basis, for such period or periods as he may provide, subject to refund with interest as determined by the Federal Energy Regulatory Commission in accordance with Section 3 hereof. No rate developed by the As-

sistant Secretary shall become effective on a final basis unless and until such rate is confirmed and approved by the Federal Energy Regulatory Commission acting under Section 2 hereof.

2. There is hereby delegated and assigned to the Federal Energy Regulatory Commission (FERC) the authority to confirm and approve on a final basis, or to disapprove, rates developed by the Assistant Secretary under Section 1, and to exercise the cost allocation authority contained in Section 7 of the Bonneville Project Act and Section 2 of the River and Harbor Act of 1945, 59 Stat. 10, 12, 21.

3. In the event a rate developed by the Assistant Secretary is disapproved by the FERC, the Assistant Secretary shall within 120 days or such additional time periods as the FERC may provide, develop and submit to the FERC a substitute rate for action by the FERC under Section 2 hereof. A rate confirmed and approved by the Assistant Secretary on an interim basis that is disapproved by the FERC shall remain in effect, as provided by the Assistant Secretary, until a substitute rate is confirmed and approved on a final basis by the FERC: *Provided*, That if the Assistant Secretary does not file a substitute rate within 120 days or such greater time as the FERC may provide, and if the rate has been disapproved because the FERC determined that it would result in total revenues in excess of those required by law, the rate last previously confirmed and approved on a final basis will become effective on a date and for a period determined by the FERC and revenues collected in excess of such rate during the interim period will be refunded with interest to the extent determined by the FERC. If a substitute rate confirmed and approved on a final basis by the FERC is lower than the rate in effect on an interim basis, any overpayment shall be refunded with interest as

determined by the FERC. If a substitute rate confirmed and approved on a final basis by the FERC is higher than the rate in effect on an interim basis, such rate shall become effective on a subsequent date set by the FERC. If at any time it is determined by the FERC that the administrative cost of a refund would outweigh the amount to be refunded, no refund will be required.

(4) For purposes of this order—

(a) "Administrator" means the Administrator of a power marketing administration.

(b) "Power marketing administration" means the Alaska Power Administration, the Bonneville Power Administration, the Southeastern Power Administration, the Southwestern Power Administration, and the Western Area Power Administration.

5. This order is effective January 1, 1979.

Issue at Washington, D.C. this 21 day of Dec., 1978

JAMES R. SCHLESINGER
Secretary of Energy

OPPOSITION

BRIEF

No. 84-1725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

CITY OF FULTON, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

CHARLES F. WHEATLEY, JR.
(Counsel of Record)
DON CHARLES UTHUS
WHEATLEY & WOLLESEN
1112 Watergate Office Bldg.
2600 Virginia Avenue, N.W.
Washington, D.C. 20037-1971
(202) 337-5543

June 3, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the United States, having entered into contracts for the sale of hydroelectric power to three small Cities at designated rates which could be changed only "in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval" was precluded from seeking, through the Secretary of Energy, to unilaterally change the effective contract rates on an interim basis prior to such confirmation and approval.

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---

BRIEF OF RESPONDENTS IN OPPOSITION

The Cities of Fulton, Lamar and Thayer, Missouri respectfully oppose the issuance of a writ of *certiorari* to the United States Court of Appeals for the Federal Circuit in the above-captioned case.

STATEMENT OF THE CASE

On April 29, 1977, the Cities of Fulton and Lamar, Missouri, entered renewal contracts[1] with the United States for the

[1]The original contracts entered on October 18, 1956 and March 3, 1952, respectively, for Fulton and Lamar, contained virtually identical language relating to how the specified rates could be changed.

purchase of hydroelectric power from certain federal dams located in Missouri and Arkansas under the power marketing jurisdiction of the Southwestern Power Administration (SWPA). The contracts contained a specific Rate Schedule (F-1) and provided as follows:

> It is understood and agreed that the rates and/or terms and conditions set forth in the said Rate Schedule "F-1", with the confirmation and approval of the Federal Power Commission, may be increased, decreased, modified, superceded, or supplemented, at any time, and from time to time, and that if so increased, decreased, modified, superceded, or supplemented, the *new rates* and/or terms and conditions *shall thereupon become effective* and applicable to the purchase and sale of Firm Power and Firm Energy under this Contract in accordance with and *on the effective dates specified in the order of the Federal Power Commission containing such confirmation and approval.*

(Emphasis added.)

The language of the contract between the United States and the City of Thayer, signed on April 15, 1963, was virtually identical.[2] (Portions of the contracts relevant to Cities' claims have been appended hereto.) SWPA was designated by the Secretary of the Interior[3] to authorize the entry of contracts by the United States with the Cities under Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, which provided as follows:

> Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the

[2]A fourth city, Piggott, Arkansas, was a party plaintiff to the Court of Claims suit. After that court entered a favorable decision on liability for the four cities, a final settlement was reached between the Government and Piggott.

[3]10 Fed. Reg. 14527 (1945).

> Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules *to become effective upon confirmation and approval by the Federal Power Commission . . .*

(Emphasis added.)

Each of the contracts with the Cities specifically noted, "WHEREAS under Section 5 of the Flood Control Act of 1944 . . . the Secretary of the Interior is authorized to . . . dispose of electric power and energy . . . at rates confirmed and approved by the Federal Power Commission . . . " Appendix pp. 1a, 3a, 6a.

After the above-described contracts had been entered with the Cities, Congress in 1977 enacted the Department of Energy Organization Act (DOEA), 42 U.S.C. § § 7101 *et seq.*, That Act did not purport to make any substantive amendment to Section 5 of the Flood Control Act of 1944, but transferred the functions of the Federal Power Commission into the Federal Energy Regulatory Commission (FERC) and the Secretary of Energy. In 1978, the Secretary of Energy issued an order which delegated to the FERC the authority to confirm and approve rates on a final basis which authority had originally been conferred upon the FPC.[4] The Cities filed suit in the Court of Claims for breach of their contracts based on the collection by SWPA of interim rates prior to the final "confirmation and approval" of those rates by the FERC.

The Court of Claims issued a final judgment of liability in the Cities' behalf on May 19, 1982 for breach of contract. *See* United States petition for writ of certiorari (Gov't Pet.) at 5a. The Government applied for an extension of time in which to file a petition for a writ of certiorari to this Court from this final judgment on liability of the Court of Claims. On November 4,

[4]Delegation Order No. 0204-33, 43 Fed. Reg. 60636 (1978)

1982, the Government announced that it would not file a petition for a writ of certiorari at that time but would seek to reserve that right to a later date. The case was remanded pursuant to the Court of Claims order of May 19, 1982 to determine the amount of recovery. Several months later, the Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25 (1982), was passed whereunder the Court of Claims ceased to exist and its trial functions were assumed by the newly-created Claims Court. Under the Act, the Claims Court obtained jurisdiction over the issue of the amount of recovery. The Government then entered a stipulation with the three Cities as to the amount of recovery at approximately $950,000 (*see* Gov't Pet. at 19a-22a) for the locked-in-period prior to the final FERC approval. The newly-created Claims Court entered judgment on that stipulation for the Cities. The Government then appealed to the new United States Court of Appeals for the Federal Circuit in which it sought to attack the earlier final judgment on liability entered by the Court of Claims.

The Court of Appeals for the Federal Circuit, in a per curiam decision, noted that the government "seeks to relitigate the identical issue that [the Court of Claims] decision resolved against it." Gov't Pet. at 1a. The Federal Circuit Court of Appeals confirmed the Court of Claims' decision both on the basis that it was the law of the case and because the court was "convinced the Court of Claims reached the correct result: the interim rate increase was a breach of contract." Gov't Pet. at 3a. Further, the Government's suggestion for an initial hearing by the full Court of Appeals in banc was denied, "since no member of this panel or any judge on the court requested a polling on a hearing in banc." Gov't Pet. at 4a.

At no time on the record in the present case has the government established that other contracts exist between SWPA and any other cities or public agencies identical to the contracts in the present case.[5] The interim rates went in effect on April 1,

[5]In fact, SWPA has recently been engaged in a program of executing new contracts with cities and public agencies which expressly do not contain the contract language involved in the present case, and SWPA has insisted on such new language as a condition precedent to new contracts.

1979, and the three Cities in the present case filed their complaint in the Court of Claims on September 18, 1980. Other than the contemporaneous *Tex-La*[6] and *Sam Rayburn Dam*[7] cases discussed by the Court of Appeals for the Federal Circuit (Gov't. Pet. at 3a), there have been no other cases filed in the over six years since the improper rates went into effect.

SUMMARY OF THE ARGUMENT

The decisions below by the Court of Claims and the Court of Appeals for the Federal Circuit, which also denied rehearing en banc, were based on the plain language of the contracts entered between the United States and the three Cities in this case. The decisions are supported by a substantial body of precedent both by this Court and other federal courts.

The attempt by the government to posit a significant conflict between the decisions below and a decision of the Fifth Circuit as a basis for review by this Court is fallacious. The *Tex-La* decision by the Fifth Circuit was based primarily on that court's view that Congress, in enacting the Department of Energy Organization Act (DOEA), 42 U.S.C. § § 7101 *et seq.*, had impliedly amended the earlier Section 5 of the Flood Control Act of 1944 to permit the putting into effect of interim rate changes prior to a final confirmation and approval by the Federal Power Commission or Federal Energy Regulatory Commission. Even if that construction of the DOEA were correct, since that Act was passed *after* the entry by the Government into the express contracts in the present case barring such action, there can be no significant conflict between the Fifth Circuit decision and the decisions by the Court

[6]United States v. Tex-La Electric Cooperative, Inc., 693 F.2d 392 (5th Cir. 1982).

[7]United States v. Sam Rayburn Dam Electric Cooperative, Inc., No. H-80-1781 (S.D. Tex. August 13, 1982), *vacated and judgment for plaintiff entered*, No. H-80-1781 (S.D. Tex. April 25, 1983) (pursuant to United States v. Tex-La Electric Cooperative, Inc., 693 F.2d 392 (5th Cir. 1982), *aff'd*, 712 F.2d 1414 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 997 (1984).

of Claims and the Federal Circuit below, which were based on a finding of a breach of contract.

The Government's statement that "the rule adopted in this case by the Federal Circuit could subject the government to monetary liability in excess of $500 million in suits for refunds bought by other power customers" (Gov't Pet. at 9) is pure unfounded speculation. Prior to the rate filing in the present case, effective April 1, 1979, SWPA had followed a long administrative practice of not putting rate changes into effect prior to confirmation and approval by the FPC/FERC. The rate increase by SWPA in the present case amounted to less than 10% of $500 million. In subsequent rate increases, SWPA has returned to its prior long standing administrative practice of first obtaining prior regulatory approval by the FERC. Nothing in the record establishes whether SWPA's other contracts are the same as those of the three Cities in the present case, but it is known that SWPA is changing its contracts when they expire, and SWPA is undertaking other procedures to expedite final FERC review and approval. If the $500 million is meant to somehow refer to contracts issued by other power marketing agencies (PMAs), it is patently misleading and erroneous because the enabling statutes of such agencies differ markedly, with some expressly authorizing interim rates, from Section 5 of the 1944 Flood Control Act which governs SWPA. Review by this Court of the narrow, technical issues addressed in the *Tex-La* decision is plainly unnecessary to the maintenance of the decisions below and should be denied.

ARGUMENT

I. The Courts Below Correctly Concluded That The Interim Rate Increase Was Barred By The Government's Contracts With Cities

The SWPA-Cities' contracts envision the rates being changed from time to time, but the contracts also expressly prescribe the manner in which the new rates are to be reviewed and ultimately allowed to go into effect. The contracts state that rates may be changed with the confirmation and approval

of the FPC and that "new rates . . . shall thereupon become effective . . . in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval." *See* Appendix, pages 2a, 4a, 6a.

Where the Government has entered into a valid commercial contract, it is well settled that it is then bound by the terms of that contract.

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much a repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality or a citizen.

The Sinking Fund Cases, 99 U.S. 700, 719 (1879). *Accord*, *California v. United States*, 551 F.2d 843, 850 (Ct. Cl.), *cert. denied*, 434 U.S. 857 (1977); *Broome Constr., Inc. v. United States*, 492 F.2d 829, 834 (Ct. Cl. 1974).

The terms of Cities' contracts contain express provisions for rate-changing procedures and those provisions leave no room for collection of new rates prior to confirmation and approval of the rates. The contracts' stipulation that new rates "shall *thereupon* become effective" (emphasis added) necessarily means that rates cannot become effective, implemented, charged or collected before confirmation and approval. Upon the Commission's order of confirmation and approval of these rates,[8] they then became effective under the Cities' contracts.

This conclusion is compelled by the rule that where the language of a contract is unambiguous, contractual terms will be given their usual and ordinary meaning. *American Science & Engineering, Inc. v. United States*, 663 F.2d 82, 88 (Ct. Cl. 1981); *S.W. Aircraft, Inc. v. United States*, 551 F.2d 1208, 1212 (Ct. Cl. 1977). If the new rate has been made expressly subject

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[8] In re United States Secretary of Energy, Southwestern Power Administration, 18 F.E.R.C. ¶ 61,025 (1982)

to approval by some body, then, pending that approval, the new rate is not yet an "approved" rate, as that term is ordinarily understood, no matter what label the Assistant Secretary of Energy chooses to put on his earlier order.

Construing the language of these contracts, the Court of Claims also recognized that these terms are very similar to the terms of contracts that provide certain procedural protections from unilateral rate changes under the Supreme Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*"); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*"); and *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958) ("*Memphis*"). *See* Gov't Pet. at 13a-14a.

In *Sierra* and *Mobile*, the filing utilities' rate increases were rejected because their contracts prohibited any unilateral change in the rates on file at the Federal Power Commission. The Court in *Mobile* reasoned that, by preserving the integrity of contracts, the prohibition against changes in rates permits stability of supply arrangements essential to the industry. 350 U.S. at 344. Similar reasoning controls in this case because the contracts prohibit unilateral changes in the rates by the SWPA and expressly provide that while the rates are non-final and subject to approval they may not be made effective against the Cities.

The Court's decision in *Memphis* describes the different contract language that can be used where the parties agree to permit a unilateral change in a designated contract rate prior to approval by the Federal Power Commission. Since the *Memphis* contract expressly allowed the utility to make a unilateral filing and put rate increases into effect on an interim basis, prior to administrative adjudication, the customers were liable for the "going rate" as filed. 358 U.S. at 112. This language stands in sharp contrast to that of Cities' contracts, however, where the Cities are not to be subject to rate changes prior to a final approval thereof by the FPC/FERC. The contracts here mandate a procedure that requires review of rates

proposed by SWPA and that links that effective date of the rate change to the final order of confirmation and approval.

The *Mobile-Sierra* doctrine of contract construction originally promulgated by this Court has been followed by numerous federal circuit courts. *See, e.g., City of Kaukauna v. FERC*, 581 F.2d 993, 996 (D.C. Cir. 1978). The language present in the *Kaukauna* contract allowed new rates "as are ultimately *made effective* through such proceedings and review." 581 F.2d at 996 (emphasis added). This language was interpreted to mean that new rates may become effective only upon *the conclusion* of a proceeding by the Federal Power Commission. The same reasoning applies to the SWPA-Cities language that establishes the rate changing procedure that requires new rate schedules to become effective only after final confirmation and approval by the Commission.

Contract language similar to the language before the courts below was reviewed by the Fifth Circuit in *Louisiana Power & Light v. FERC*, 587 F.2d 671 (5th Cir. 1979), where the contract provided for a change in rate only by order issued by a regulatory authority.[9] *Id.* at 674. The court interpreted this language as barring any change in the rates prior to a final order by the Commission on the merits of the increase.[10]

The *Louisiana Power & Light* court based its decision on two reasons. First, if the parties had in fact agreed to allow a change in rates under section 205 of the Federal Power Act, with its interim ratemaking authority, the contracts should have stated as much in unambiguous terms. 587 F.2d at 675, *citing Public Service Company of New Mexico v. FPC*, 557

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[9]The contract language interpreted in *Louisiana Power & Light* stated as follows:

> The terms and conditions of this Agreement and Rate Schedule are subject to amendment or alteration *as a result of and in accordance with a valid applicable order of any governmental authority having jurisdiction hereof.*

[10]587 F.2d at 676.

F.2d 227, 232 (10th Cir. 1977). The second reason was that, under the *Mobile-Sierra* doctrine, the contract establishes the manner in which rates may be changed. Therefore, if interim ratemaking authority was intended to apply, then the manner of change would be left to the Company, not the Commission, and this was clearly not what the parties intended. The interpretation of the SWPA-Cities contracts should follow the reasoning of the *Louisiana Power & Light* court.[11]

The SWPA is no stranger to the *Mobile-Sierra* doctrine and should understand the implications of its contract language. In *Sam Rayburn Dam Electric Cooperative v. FPC*, 515 F.2d 998 (D.C. Cir. 1975), *cert. denied sub nom., Gulf States Utilities Co. v. FPC*, 426 U.S. 907 (1976), the SWPA, Gulf States Utilities Company, and a cooperatively-owned customer contracted, with the encouragement of the Administrator of SWPA, for the sale and transmission of SWPA power to the cooperative, under language which required regulatory approval.[12] The court held that the parties intended to "reflect, first, an acknowledgement that even an agreed-upon rate increase would necessarily be subject to the final approval of the appropriate regulatory agency, and second, an understanding that such an increase could not become effective *until* the agency so ordered." 515 F.2d at 1003 (emphasis in original).

In *Associated Electric Cooperative, Inc. v. Morton*, 507 F.2d 1167 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 830 (1975), the court noted that the contract language between SWPA and the

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[11] *See also*, Richmond Power & Light v. FPC, 481 F.2d 490, 497 (D.C. Cir. 1973), *cert. denied sub nom.*, Indiana & Michigan Electric Co. v. FPC, 414 U.S. 1068 (1973).

[12] The clause stated in pertinent part:

> This Contract shall not become effective unless and until the rates, compensation, and terms and conditions, provided in both this contract and in the SPA-Sam Dam Co-op Contract are confirmed and approved by such state or federal regulatory bodies having jurisdiction and required by law to accept, confirm, and/or approve such rates, compensation, and terms and conditions. . . .

Cooperative provided that "rates may be increased or decreased by the S[W]PA, subject to the approval of the FPC." 507 F.2d at 1172. The SWPA submitted the rates to the FPC in January, 1970 and awaited FPC review, which was completed on May 28, 1970, before collecting the rates in June, 1970. *Id.* at 1173. This case is evidence of the long-standing administrative construction by SWPA that it must await final Commission review and approval before collecting the higher rates. *Id.* at 1172.[13]

More recently, the SWPA was enjoined from collecting higher rates under Rate Order No. SWPA-1 because they violated the terms of a contract. In *Arkansas Power & Light Co. v. Schlesinger*, Civ. Action No. 79-1263 (D.D.C. October 20, 1980), *appeal dismissed*, No. 80-2573 (D.C. Cir. Jan. 26, 1981), the court relied on the contract to prohibit collection of increased rates. That contract also provided that any change in the rates would go into effect upon the confirmation and approval of the FPC.

Thus, the interpretation of the instant contracts by the courts below is amply supported even if one looks no further than the language of the rate-changing terms of the contracts. Additionally, the *Mobile-Sierra* cases by the Court in 1956 relating to contract language barring unilateral rate increases were well-known law when SWPA entered the contracts in this case.

The City of Thayer signed its contract with SWPA on April 15, 1963. The Cities of Fulton and Lamar signed their contracts with SWPA on April 29, 1977. Analysis of SWPA and FPC practice contemporaneous with those dates leaves little doubt that the parties, at the time of execution, anticipated that no new rates would be charged under the contracts until administrative review of the new rate was completed. *See In re United States Department of the Interior, Southwestern Power Administration*, 18 F.P.C. 153, 158 (1957) (general rate in-

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[13] *See* discussion *infra* at 12.

crease); 30 F.P.C. 1608, 1610 (1963) (aluminum contract rate redetermination); 42 F.P.C. 662 (1969) (extension of *existing* rates for prospective periods to allow review of newly-filed increases for Whitney Project rates); 45 F.P.C. 394, 397 (1971) (Sam Rayburn Dam Project rate increase); 45 F.P.C. 183, 185 (1971) (Narrows Dam Project rate increase); 56 F.P.C. 795, 803 (1976) (Narrows Dam Project rate increase). For the 20-year period preceding and contemporaneous with the execution of these contracts, no SWPA rate was allowed to take effect while it was subject to administrative review or before issuance of the order finally confirming and approving the rate. This review of the practice respecting SWPA rates demonstrates conclusively that interim rates simply could not have been within the contemplation of the parties when these contracts were signed.

The courts below clearly recognized this. The Court of Claims reviewed past agency practice to aid its conclusion that Cities' contracts barred interim rate increases. *See* Gov't Pet. at 14a-16a. Thus, the Court distinguished three of the purported "interim" rate orders advanced by the Government on the grounds, *inter alia*, that the party involved was the Bonneville Power Administration or the Southeastern Power Administration and because contractual terms similar to those in Cities' contracts were absent.[14]

Despite the plain language of the rate-changing terms of these contracts, despite consistent judicial interpretation under the *Mobile-Sierra* doctrine of similar contractual terms, despite the clear language of the related terms in these contracts and despite the overwhelming evidence of consistent administrative practice contemporaneous with these contracts, the Government contends that Cities' contracts allow rates that are still subject to required administrative review to be imposed on the Cities. Gov't Pet. at 16-18.

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[14]The Government's evident attempt to rebut the Court of Claims' distinguishing of those orders (Gov't Pet. at p. 15) appears to be yet another attempt to obscure the fact that the court was interpreting a contract there, and not a statute. The Government consistently refuses to acknowledge that the contracts control this case.

The Government argues that because the contracts "incorporate the language of the Flood Control Act, they should be interpreted in the same manner as the statute" (Gov't Pet. at 17). The Government then cites to *Tex-La* for the proposition that the DOEA amended the Flood Control Act in 1978. Therefore, one must conclude that the DOEA amended SWPA's contracts with Cities.

The above syllogism is in total derogation of the principles of contract law applied by the courts below. The Court of Claims correctly held that the Government is no less bound to the terms of its mutually agreed-upon contracts than is any private party. Gov't Pet. at 12a. The terms of a contract will be construed in light of their language, the contract as a whole and the conduct of the parties contemporaneous with and following the formation of the contract. In this case, all of the above evidence points strongly to the conclusion that the parties intended there to be no implementation of rates on an "interim basis", while those rates were unreviewed or still subject to administrative review. By its assumption of the powers and obligations of the SWPA, the Department of Energy could not thereby amend that obligation. The controlling rule is that a subsequent party is under a duty to investigate the intended meaning of the contract and is bound to the interpretation established between the contracting parties. *Perry and Wallis, Inc. v. United States*, 427 F.2d 722, 725 (Ct. Cl. 1970). In essence the DOE inherited the SWPA-Cities contracts and is therefore bound by the terms agreed to and the interpretations understood by the parties at the time the contracts were executed. The contract requirement of the completion of required administrative review prior to changes in the rates charged cannot be avoided years after the contract went into effect and certainly cannot be altered on the basis of a dubious legal interpretation of a new statute.

Moreover, interpreting the contract language of the rate-changing terms to allow rates to be changed in whatever manner the Government from time to time deems appropriate would violate the general rule that contracts should be inter-

preted in a manner that does not put one party at the mere will or mercy of the other. *Contra Costa County Flood Control and Water Conservation District v. United States*, 512 F.2d 1094, 1098 (Ct. Cl. 1975). SWPA's contracts stand as the bulwark against procedural unfairness in the marketing of federal power. By agreeing to unlimited rate changes, but only after administrative review, Cities endeavored to ensure that the rates they paid would, as far as possible, be both fair and reasonable. Thus, the Government's interpretation would take away a vital procedural protection of the contract, namely complete administrative review prior to the new rates taking effect. Without this protection, the contract is reduced to nothing more than a one-sided agreement to purchase power at whatever price the seller dictates, determined in whatever manner the seller dictates and imposed at any time the seller chooses. Clearly, this result was not what the parties intended when they entered into the contracts at issue in this case.

II. The Interim Rate Increase Was Also Barred By The Flood Control Act of 1944

Rate Order No. SWPA-1, 44 Fed. Reg. 13068 (March 9, 1979), purported to increase, on an interim basis, Cities' rate obligations to the government. That action was outside the Secretary of Energy's authority under the Flood Control Act.

1. The Flood Control Act of 1944 does not confer discretionary authority to place rates into effect on an interim basis. Section 5 reads, in pertinent part:

> Electric power and energy generated at reservoir projects . . . shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, *the rate schedules to become effective upon confirmation and approval by the Federal Power Commission.*

16 U.S.C. § 825s (emphasis added).

A review of major economic regulatory statutes[15] demonstrates that Congress has known long and well how to enact legislation expressly authorizing an agency to implement interim rates. Those statutes, in almost every instance, also confer authority on the Federal Energy Regulatory Commission, the Federal Communications Commission and the Interstate Commerce Commission to order an accounting and refund of interim rates collected in excess of the rate as finally approved. With respect to the ICC's power under the Interstate Commerce Act, this Court has said that "it is plain that refund provisions are a necessary and directly related (citation omitted) means of discharging the Commission's other mandate to protect the public pending a more complete determination of the reasonableness of the . . . rates." *Trans Alaska Pipeline Rate Cases* ("*TAPS*"), 436 U.S. 631, 655 (1978).

The language of § 5 of the Flood Control Act clearly differs from the language Congress repeatedly used to confer interim rate-making authority. Furthermore, the Flood Control Act makes no provision whatsoever for a mechanism of accounting and refunds—a mechanism that this Court has recognized as a necessary and directly related corollary to the implementation of rates on an interim basis. One may safely conclude, therefore, that Congress meant what it said when it enacted § 5: rates for federal hydro-power may be collected from consumers only after approval by the Federal Power Commission.

The FPC followed this practice from 1944 through 1977. *See, e.g., In re United States Department of the Interior, Southwestern Power Administration*, 18 F.P.C. 153, 158, Ordering ¶ (A) (1957); *In re United States Department of the Interior,*

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[15] *See* Natural Gas Act, 15 U.S.C. § 717c(e) ("If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural gas company making the filing, the proposed change of rate . . . shall go into effect . . . ."). *See also*, Federal Power Act, 16 U.S.C. § 824d(e); Federal Communications Act, 47 U.S.C. § 204; Interstate Commerce Act, Part I, 49 U.S.C. § 15(7); Motor Carrier Act, 49 U.S.C. §§ 316(g), 318(c); Water Carrier Act, 49 U.S.C. §§ 907(g), (i); Freight Forwarders Act, 49 U.S.C. § 1006(e); Federal Aviation Act, 49 U.S.C. § 1482(g).

Southeastern Power Administration, 35 F.P.C. 406, 408 (1966); *In re United States Department of the Interior, Southeastern Power Administration*, 49 F.P.C. 1477, 1480, Ordering ¶ (A) (1973). The Government offers one FPC order under the Flood Control Act to justify its contention that that Act has always conferred interim rate-making authority. Gov't Pet. at 14. In the first place, a sole instance of agency practice will garner little or no judicial regard when a statute is being interpreted, especially where that instance represents a departure from prior consistent agency practice. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). Second, the exercise of purported authority in the order cited by the Government, *In re United States Department of the Interior, Southeastern Power Administration*, 54 F.P.C. 3 (1975), was strongly opposed by the Department of the Interior, as the Court of Claims noted. Gov't Pet. at 15a-16a. The Government finds itself hard-pressed to explain away the Assistant Secretary's direct indictment:

> . . . This Commission does not have authority to make its confirmation and approval conditioned upon the outcome of further proceedings or upon the agreement by SEPA to make refunds or credits if the Commission changes its mind. . . .

Id.

In conclusion, there can be little doubt tht the FPC's authority with respect to rates for federal hydroelectric power was neither plenary nor included the power to order rates into effect on an interim basis. The Flood Control Act generically differs, in its purpose, scope, detail and in the degree of authority expressly conferred, from the statutes construed by this Court in the *TAPS* case, 436 U.S. 631, in *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); in *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942); and in *The New England Divisions Case*, 261 U.S. 184 (1923).

Section 5 of the Flood Control Act confers on the FPC the limited authority to approve and confirm (or disapprove and

remand) a new rate; Section 5 further expressly mandates that no rate may be charged which is still subject to required confirmation and approval; i.e., no rate may be placed into effect on an interim basis.

2. The DOEA did not amend the requirements of Section 5 of the Flood Control Act; the Government's contentions to the contrary are unsupported. The Government argues in its petition that review by this Court is necessary because, *inter alia*, the decisions of the Federal Circuit and the Court of Claims are contrary to the plain language of the DOEA. Gov't Pet. at 10. This statement is remarkably bold, considering that the Fifth Circuit in *Tex-La* (by its own admission,[16] the only decision in support of the rather curious conclusion that the DOE Act's *transfer* of functions to the Secretary of Energy in fact substantively *amended* Section 5 of the Flood Control Act) repeatedly concedes that the plain language of § 501(a)(1) of the DOE Act, 42 U.S.C. § 7191(a)(1), compels the conclusion that the powers received by the Secretary of Energy were transferred but not changed. *See* 693 F.2d at 400, 404, 411 (Gov't Pet. at 40a-41a, 48a, 64a).

The heart of the Government's argument is its contention that the DOEA, by its consolidation of various rate-making functions in the Department of Energy, endowed the Secretary of Energy with supreme authority over federal power rates and so blessed the Secretary with authority to promulgate rates in any fashion without regard to whatever statutory limitation on the exercise of those functions existed prior to the consolidation (Gov't Pet. at 11-15).

The Government argues that this result is necessary to effectuate the Congress' goal in passing the DOEA of achieving, through a single department, the effective management of energy functions of the federal government. The Government argues here that if statutory limitations on the exercise of authority, such as those limits contained in Section 5 of the

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[16] 693 F.2d at 398 (Gov't Pet. at 36a).

Flood Control Act, are read to survive the DOEA, then Congress' efforts to achieve the above goal would be nullified, "because it would continue to require bifurcated decisionmaking where Congress sought to consolidate authority in order to eliminate inefficiency" (Gov't Pet. at 12).

There are numerous flaws in this argument. First, it fails to take account of the requirement of § 302(a)(2) of the DOEA, 42 U.S.C. § 7152(a)(2), that the rate proposal function of the Department of the Interior under Section 5 of the Flood Control Act continue to be exercised by and through the administrators of the Power Marketing Administrations (PMAs). Congress wished to ensure that the PMAs retain their separate and distinct identities as regional agencies responsive to local conditions and concerns. *See* S. Rep. No. 95-164, 95th Cong., 1st Sess. 29-30 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News, 854, 883-884. Thus, Congress strove to ensure that bifurcated decision-making with respect to federal power rates would continue. Clearly Congress did *not* intend that the Secretary of Energy exercise undivided and absolute power over the rates.

A second, related, flaw in the Government's argument is its failure to give due regard to the command of § 501(a)(1) of the DOEA, 42 U.S.C. § 7191(a)(1), that:

> If any provision of any Act, the functions of which are transferred, vested, or delegated pursuant to this Act, provides administrative procedure requirements in addition to the requirements provided in this title, such additional requirements shall also apply to actions under that provision.

Id. Since § 5 of the Flood Control Act was drafted so as to bar implementation of rates before the completion of full administrative review, Section 501(a)(1) of the DOE Act mandates that that restriction continue to apply to the transferrees of the § 5 rate-making functions in the new Department of Energy. Section 501(a)(1) is also a general repudiation of the "merger" argument advanced here by the Government. If the Department of Energy is required to honor the limitations attached to the functions it received, then the Department must also be foreclosed from avoidance of those limitations through the amalgamation (on paper) of those functions. Any other construction would render § 501(a)(1) meaningless.

Thirdly, the Government's argument fails to recognize that, although Congress gave to the Secretary of Energy both the rate proposal and the rate confirmation and approval function, Congress did not alter the requirement of the Flood Control Act that the confirmation and approval function be completed before new rates may be imposed. Thus, while the Secretary could delegate and divide that function amongst subordinate officials and agencies, he lacks the power under the Flood Control Act to "jump the gun" and order any new rate to take effect while the mandated confirmation and approval function is not complete. Only "upon confirmation and approval," may the rate take effect. In this case, the Government has conceded that the rate review exercised by the FERC over the rate increase was a portion of and pursuant to the rate authority under the Flood Control Act (Gov't Pet. at 13). Therefore, the activity the FERC was engaged in was part of the approval and confirmation function required by § 5. The FERC, as the Government concedes, was *not* engaged in some type of review outside of the Flood Control Act. Therefore, until the FERC had completed its delegated portion of the confirmation and approval function required by the Flood Control Act, the new rate could not be allowed to take effect. The Government refuses to recognize what was persuasively articulated by the district court in the *Tex-La* Case:

> *interim* rate approval and confirmation . . . was never included in the FPC function under Section 5 of the Flood Control Act, nor was it contained in the [DOEA].
>
> * * *
>
> The Secretary of Energy was given specific rate-making powers pursuant to the 1944 Flood Control Act. The transfer of the rate design and confirmation functions did

> not work, as the [Government] suggests, some sort of magic merger whereby the Secretary acquired the authority to impose interim rates. No merger of function occurred, but rather only a merging of the exercises of function.

United States v. Tex-La Electric Cooperative, Inc., 524 F. Supp. 409, 418-419 (E.D. La. 1981), *reversed*, 693 F.2d 392 (5th Cir. 1982) (emphasis in original).

Fourth, and finally, the Government's argument lacks persuasive support. The Fifth Circuit's *Tex-La* decision, in addition to its other faults (adopted by the Government and rebutted above) engages in the same sort of judicial legislation that led to reversal of the Fifth Circuit by this Court in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) in which the Court stated that:

> Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'

Id. at 570, *quoting Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *Tex-La* also fails to meet the standard of statutory construction set forth in *United States v. Rutherford*, 442 U.S. 544 (1979):

> Only when a literal construction of a statute yields results so manifestly unreasonable that they could not be attributed to congressional design will an exception to statutory language be judicially implied.

Id. at 555.

The Government's position also cannot be based upon the other decisions that the Government cites for the proposition that the Secretary of Energy has the power to impose rate increases on an interim basis. *See* Gov't Pet. at 9. Those two decisions, *Montana Power Co. v. Edwards*, 531 F. Supp. 8 (D. Ore. 1981); *Pacific Power & Light Co. v. Duncan*, 499 F. Supp. 672 (D. Ore. 1980), were criticized and distinguished even by *Tex-La*. *See* 693 F.2d at 411 (Gov't Pet. at 64a); *see also*, *United States v. Tex-La Electric Cooperative, Inc.*, 524 F. Supp. at 419-420 (rejecting some cases for reasons adopted by the Fifth Circuit in *Tex-La*); *Fulton, et al. v. United States*, Gov't Pet. at 18a, (rejecting same cases).

In sum, the Flood Control Act of 1944 requires confirmation and approval before new rates will be allowed to take effect. Since review here by the FERC was pursuant to that requirement, no new rate could be imposed before that review was complete and the rate increase therefore confirmed and approved.

III. Any Conflict Between The Opinions Below And The Fifth Circuit's *Tex-La* Opinion Is Too Insignificant To Warrant This Court's Attention

Cities brought this suit charging that the Government had breached its contracts with Cities. As a result of rather unique circumstances,[17] two appellate panels have reviewed this case and independently concluded that the Cities' contracts *were* breached. The court which arguably had primary responsibility (prior to October 1, 1982) for the development of the law of federal government contracts analyzed these facts and concluded "that the Government breached its contract with plaintiffs in the case at bar" (Gov't Pet. at 18a). Subsequently, the court which today arguably shoulders the primary respon-

[17]Cities filed their petition in the United States Court of Claims on September 18, 1980. A three-judge panel of that court resolved cross-motions for summary judgment on the issue of the Government's liability against the Government in an opinion decided May 19, 1982. On October 1, 1982, pursuant to § 403(d) of the Federal Courts Improvement Act of 1982, 96 Stat. 58, the Court of Claims ceased to exist. The United States Claims Court assumed the trial function of the former court and appellate responsibilities were assumed by the newly-created Court of Appeals for the Federal Circuit. Pursuant to the earlier finding of liability, the new Claims Court entered judgment for Cities on January 20, 1984. On January 9, 1985 the new Federal Circuit, addressing the same liability issue earlier resolved against the Government, affirmed the judgment of the Claims Court.

sibility for the development of the law of federal government contracts reviewed these facts and was "convinced" that "the interim rate increase was a breach of contract." Gov't Pet. at 3a.

The Government now contends that Supreme Court review of both[18] of thse decisions is necessary because, *inter alia*, the decisions "squarely conflict" with the decision of the Fifth Circuit in *Tex-La*.[19] However, as a fresh reading of all three opinions will reveal, the "conflict" is one for the most part manufactured by the Government for purposes of its petition.

As noted above, the three-judge panel of the Court of Claims concluded that the Government had breached its contracts with Cities. On its cross-motion for summary judgment the Government had formulated "an ingenious defense", as the court termed it, to Cities' contract breach claims. Gov't Pet. at 9a. The Court of Claims treated the merits of the Government's statutory argument, and then stated:

> The Government's elaborate argument that the Secretary of Energy was provided with authority to enact interim rate increases under the DEOA also fails to address plaintiffs' central theory of recovery in this case, breach of contract.

Gov't Pet. at 12a. The issue of the Assistant Secretary of Energy's authority under the Flood Control Act is distinct from the issue of the Government's obligations under mutually agreed-upon contracts. While resolution of both questions might provide *alternative* grounds for disapproval of the Government's interim rate implementation, the Court of Claims rather saw its discussion of the statutory authority in terms of rebutting an argument which it deemed at any rate to be off the point.

The Fifth Circuit *Tex-La* opinion confines its criticism of the Court of Claims' *Fulton* opinion to the latter court's rebuttal of

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[18]Gov't Pet. at 10 n.12.

[19]Gov't Pet. at 9.

the Government's statutory argument. *See Tex-La*, 693 F.2d at 395 (Gov't Pet. at 30a-31a). As we have seen, the Court of Claims did not consider that discussion to be necessary to a resolution of the Cities' breach of contract claims. And unlike the Government in its petition here, the Fifth Circuit came to a similar recognition. The *Tex-La* court's "conflict" is with language which that court itself proclaims to be "*dicta*" in the Court of Claims *Fulton* opinion, 693 F.2d at 409 (Gov't Pet. at 59a) (emphasis added).

The Federal Circuit's subsequent affirmance of the Court of Claims is based on the Federal Circuit's regard for the Court of Claims' decision as the law of the case and is bolstered by the Federal Circuit's conviction that "the interim rate increase was a breach of contract." Gov't Pet. at 3a. The significance attached by the Federal Circuit to the statutory authority concerns may be instructively discerned from the fact that the court relegates its discussion of the question to a single footnote.[20]

IV. This Breach Of Contract Case Lacks The Substantial Importance That Would Justify Review By This Court

The Government makes two basic arguments to justify the importance of the "issue" presented in this case.[21] Gov't Pet. at 18-21. The Government first contends that the power to impose interim rates is crucial to SWPA's fiscal health. Secondly, the

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[20]The Government's contention that the Federal Circuit ". . .rested its support of the Court of Claims' decision solely upon a district court decision that was vacated pursuant to the Fifth Circuit's decision . . ." (Gov't Pet. at 9) is no more than a transparent attempt to mislead the Court into the belief that this case begins and ends with construction of the DOEA. It is quite apparent from the opinions below, however, that neither the Court of Claims nor the Federal Circuit framed their decisions in such terms. The Federal Circuit approved of the reasoning of the *Sam Rayburn Dam* district court decision, but only in aid of the Federal Circuit's ancillary conclusion that the DOEA did not authorize interim rate collections. Gov't Pet. at 3a.

[21]Yet again, the Government ignores the fact that the principal "issue" in this case is whether Cities' contracts were breached.

Government warns that half a billion dollars will be siphoned away from the Treasury if the decision below is not overturned.

As to that latter argument, the dollar figure is totally unsupported and the Government has made no effort whatsoever to show whether or not the many limiting circumstances inherent in this case could combine in any other case. The most obvious limiting factor (to all but the Government) is the presence of the Cities' contracts. Both holdings below ultimately concluded that Cities' contracts were breached. The Government has not even offered to show whether the language of these dated contracts has general or current applicability. Additionally, suits against the United States in the Claims Court are subject to an express statute of limitations[22] and might also be dismissed with a laches defense. Interim rate impositions were congressionally authorized for the largest PMA, the Bonneville Power Administration, in 1980, by § 7(i)(6) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839e(i)(6). Therefore, customers of the largest of the PMA's would have great difficulty relying on the *Fulton* decision in any suit for refunds. Finally, the Government makes reference to not a single such refund suit filed in the more than three years that have elapsed since the Court of Claims issued its opinion holding the Government liable for refunds to the Cities.

The Government's argument that interim rate collection is crucial to any financial stability of the SWPA and the other PMAs is patently hollow in view of the long administrative history. If any problem exists that cannot be remedied by new contracts or new administrative procedures, the matter should be addressed by Congress.

Lack of authority to impose interim rates is not the source of whatever financial distress SWPA currently finds itself in. Therefore, SWPA should be able to meet its statutory obligations *whether or not* it is allowed to impose interim rates.

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[22] 28 U.S.C. § 2501.

SWPA's finances have been the subject of discussion for some twenty years. In the decade of the 1960's, at a time when the Commission adhered scrupulously to the requirement that no rate—whether an increase or merely an extension of existing rates for a new period—could be collected prior to the issuance of an order of confirmation and approval covering the period of prospective application, SWPA had ample opportunity to increase its rates. To seek to lay any such problem at the door of the lack of interim rate authority is patently unbelievable. Therefore, it should be obvious that SWPA's claimed financial distress has never been a product of the confirmation and approval functions. The cause lies elsewhere, in areas not amenable to resolution by Supreme Court review of this case.

In other words, the SWPA had repeated opportunity to tend to its finances in a manner that conformed to the legal requirements of the Cities' contracts and § 5 of the Flood Control Act. If the FPC could manage over and again to arrange such opportunities for the SWPA, there is no reason, and the Government has certainly offered none here, why the Department of Energy today is incapable of performing the confirmation and approval function required by the Flood Control Act in a similarly efficient manner. The FPC experience demonstrates that the PMA's *should* be able to fulfill their statutory obligations *regardless* of the availability of interim rates. More importantly, the SWPA should adhere to contractual rights and required procedural protections in the obligations it has undertaken with the Cities, as confirmed by the Court of Claims and Federal Circuit below.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Cities of Fulton, Lamar and Thayer, Missouri request that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
(COUNSEL OF RECORD)
DON CHARLES UTHUS
WHEATLEY & WOLLESEN
1112 Watergate Office Bldg.
2600 Virginia Ave., N.W.
Washington, D.C. 20037-1971
(202) 337-5543

June 3, 1985

APPENDIX

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
SOUTHWESTERN POWER ADMINISTRATION

POWER SALES CONTRACT

Between

UNITED STATES OF AMERICA

and

THE CITY OF FULTON, MISSOURI

THIS CONTRACT, made and entered into this 29th day of April, 1977, by and between the UNITED STATES OF AMERICA, as represented by the Administrator, Southwestern Power Administration, a bureau of the Department of the Interior (hereinafter "SPA"), and THE CITY OF FULTON, MISSOURI, a municipal corporation organized and existing under the laws of the State of Missouri, acting through its duly authorized officials (hereinafter "Fulton");

WITNESSETH, That

WHEREAS, under Section 5 of the Flood Control Act of 1944 (58 Stat. 887, 890; 16 U.S.C. 825s), the Secretary of the Interior is authorized to transmit and dispose of electric power and energy generated at reservoir dam projects under the control of the Department of the Army in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, at rates confirmed and approved by the Federal Power Commission, and with preference in the sale of such power and energy given to public bodies and cooperatives;

* * *

ARTICLE II

SALE OF FIRM POWER AND ASSOCIATED ENERGY BY SPA

* * *

Section 6. *Rates and Charges for Firm Power and Firm Energy.* (a) Fulton shall compensate SPA each month for 3,000 kilowatts of Firm Power and for the quantity of Firm Energy scheduled and received during the preceding month at the rates and under the terms and conditions set forth in Rate Schedule "F-1", a copy of which is attached to this Contract identified as Exhibit "1", and by this reference made a part hereof. It is understood and agreed that the rates and/or terms and conditions set forth in the said Rate Schedule "F-1", with the confirmation and approval of the Federal Power Commission, may be increased, decreased, modified, superseded, or supplemented, at any time, and from time to time, and that if so increased, decreased, modified, superseded, or supplemented, the new rates and/or terms and conditions shall thereupon become effective and applicable to the purchase and sale of Firm Power and Firm Energy under this Contract in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval.

(b) SPA shall promptly notify Fulton if the rates and/or terms and conditions set forth in the said Rate Schedule "F-1", or the then applicable rate schedule, have been modified, increased, decreased, superseded, or supplemented. If the cost of Firm Power and Firm Energy purchased by Fulton under this Contract is thereby increased, and if Fulton does not wish to continue to purchase Firm Power and Firm Energy at such increased cost, Fulton shall within six months after receipt of such notice notify SPA in writing of its election to terminate this Contract in its entirety, such termination to be effective on the first day of the billing period specified by Fulton, but not later than twelve months from the date of such notice to SPA. Firm Power and Firm Energy purchased by Fulton during the

period until the effective date of such termination shall be paid for at the new rates and/or terms and conditions as confirmed and approved by the Federal Power Commission.

* * *

UNITED STATES
DEPARTMENT OF THE INTERIOR
SOUTHWESTERN POWER ADMINISTRATION

POWER SALES CONTRACT
Between
UNITED STATES OF AMERICA
and
THE CITY OF LAMAR, MISSOURI

THIS CONTRACT, made and entered into this 29th day of April, 1977, by and between the UNITED STATES OF AMERICA, as represented by the Administrator, Southwestern Power Administration, a bureau of the Department of the Interior (hereinafter "SPA"), and THE CITY OF LAMAR, MISSOURI, a municipal corporation organized and existing under the laws of the State of Missouri, acting through its duly authorized officials (hereinafter "Lamar");

WITNESSETH, That

WHEREAS, under Section 5 of the Flood Control Act of 1944 (58 Stat. 887, 890; 16 U.S.C. 825s), the Secretary of the Interior is authorized to transmit and dispose of electric power and energy generated at reservoir dam projects under the control of the Department of the Army in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, at rates confirmed and approved by the Federal Power Commission, and with preference in the sale of such power and energy given to public bodies and cooperatives;

* * *

ARTICLE II
SALE OF FIRM POWER AND ASSOCIATED ENERGY BY SPA

* * *

Section 6. *Rates and Charges for Firm Power and Firm Energy.* (a) Lamar shall compensate SPA each month for Firm Power and Firm Energy purchased during the preceding billing period at the rates and under the terms and conditions set forth in Rate Schedule "F-1", a copy of which is attached to this Contract identified as Exhibit "1", and by this reference made a part hereof. It is understood and agreed that the rates and/or terms and conditions set forth in the said Rate Schedule "F-1", with the confirmation and approval of the Federal Power Commission, may be increased, decreased, modified, superseded, or supplemented, at any time, and from time to time, and that if so increased, decreased, modified, superseded, or supplemented, the new rates and/or terms and conditions shall thereupon become effective and applicable to the purchase and sale of Firm Power and Firm Energy under this Contract in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval.

(b) SPA shall promptly notify Lamar if the rates and/or terms and conditions set forth in the said Rate Schedule "F-1", or the then applicable rate schedule, have been modified, increased, decreased, superseded, or supplemented. If the cost of Firm Power and Firm Energy purchased by Lamar under this Contract is thereby increased, and if Lamar does not wish to continue to purchase Firm Power and Firm Energy at such increased cost, Lamar shall within six months after receipt of such notice notify SPA in writing of its election to terminate this Contract in its entirety, such termination to be effective on the first day of the billing period specified by Lamar, but not later than twelve months from the date of such notice to SPA. Firm Power and Firm Energy purchased by Lamar during the period until the effective date of such termination shall be paid for at the new rates and/or terms and conditions as confirmed and approved by the Federal Power Commission.

Firm Power and Firm Energy purchased by Lamar during the period until the effective date of such termination shall be paid for at the new rates and/or terms and conditions as confirmed and approved by the Federal Power Commission.

* * *

UNITED STATES
DEPARTMENT OF THE INTERIOR
SOUTHWESTERN POWER ADMINISTRATION

CONTRACT

Between

UNITED STATES OF AMERICA

and

CITY OF THAYER, MISSOURI

and

ARKANSAS MISSOURI POWER COMPANY

THIS CONTRACT, made and entered into this 15th day of April, 1963, by and between the UNITED STATES OF AMERICA, acting through the Secretary, Department of the Interior, as represented by the Administrator, Southwestern Power Administration, a bureau of the Department of the Interior (hereinafter referred to as "SPA"), and the CITY OF THAYER, MISSOURI, a municipal corporation organized and existing under the laws of the State of Missouri, acting through its duly authorized officials (hereinafter referred to as "Thayer"), and the ARKANSAS MISSOURI POWER CO., of Blytheville, Arkansas, a public utility corporation, organized and existing under the laws of the State of Arkansas, acting through its duly authorized officials (hereinafter referred to as the "Company");

WITNESSETH That,

WHEREAS, under Section 5 of the Flood Control Act of 1944 (58 Stat. 887, 890; 16 U.S.C. 825a), the Secretary of the Interior is authorized to transmit and dispose of surplus electric power and energy generated at reservoir projects under the control of the Department of the Army, in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, at rates confirmed and approved by the Federal Power Commission, and with preference in the sale of such power and energy given to public bodies and cooperatives;

* * *

ARTICLE II

SALE OF FIRM POWER AND ASSOCIATED ENERGY BY SPA

* * *

Section 4. *Compensation for Firm Power and Associated Energy.* (a) Thayer shall compensate SPA each month for Firm Power and associated energy purchased during the preceding month at the rates set forth in Rate Schedule "F-1", a copy of which is attached to this Contract identified as Exhibit "1", and by this reference made a part hereof. It is understood and agreed that the rates set forth in the said Rate Schedule "F-1" may, with the confirmation and approval of the Federal Power Commission, be increased, decreased, or superseded, at any time and from time to time, and that if so increased, decreased, or superseded, the new rates shall thereupon become effective and applicable to the sale of Firm Power and associated energy under this Contract in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval.

(b) SPA shall promptly notify Thayer if the rates set forth in the said Rate Schedule "F-1", or the then applicable rate schedule, have been increased, decreased, or superseded, and if Thayer does not wish to continue to purchase Firm Power and associated energy under the new rates, it shall within six

months after receipt of such notice notify SPA in writing of its election to terminate this Contract, such termination to be effective on the first day of the billing period specified by Thayer but not later than thirty-six months from the date of such notice. Firm Power and associated energy purchased by Thayer during the period until the effective date of such termination shall be paid for at the new rates confirmed and approved by the Federal Power Commission.

REPLY

BRIEF

No. 84-1725

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF FULTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1725

UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF FULTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

1. Respondents assert that the courts below invalidated the interim rate increase on the basis of the "plain language" of the contracts between respondents and the United States and did not address the Secretary of Energy's statutory authority to set hydroelectric power rates (Br. in Opp. 5-6, 12 n.14, 23 nn.20, 21). In fact, both the Court of Claims (Pet. App. 10a-13a, 14a-16a) and the Federal Circuit (*id.* at 3a n.*) held that the Secretary lacked the authority to impose the interim rate increase at issue here. Neither court distinguished between the language of the statute governing rate changes and the virtually identical provisions of respondents' contracts relating to this issue, and there is no basis for respondents' attempt to draw such a distinction in this Court.[1]

[1]It is clear that the courts below did not, and could not, rest their decisions on the "plain language of the contracts" (Br. in Opp. 5). The contracts contain no express prohibition of interim rate increases. Moreover, the contracts provide that new rates will go into effect "on

The contracts state that rates may be changed "with the confirmation and approval of the Federal Power Commission" and "shall thereupon become effective * * * in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval" (C.A. App. 93, 127, 157). The statute, Section 5 of the Flood Control Act of 1944, 16 U.S.C. (1976 ed.) 825s, provides that rates will "become effective upon confirmation and approval by the Federal Power Commission." In view of the striking similarity between the terms of the contracts and the language of the statute — a similarity that respondents completely ignore — the only possible conclusion is that the parties intended to incorporate the pertinent statutory provision into the contracts. See Pet. App. 50a (*United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F.2d 392 (5th Cir. 1982)). Thus, the statutory and contract issues are one and the same: since the statute authorizes the imposition of interim rate increases, the virtually identical language in respondents' contracts cannot be read to insulate respondents from those rate increases.[2]

Respondents' own arguments regarding the interpretation of the contracts and statute confirm that only a single issue is presented here. They rest their interpretation of the contracts on their unsupported conclusion that an interim

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the effective date specified in the order of the Federal Power Commission containing * * * confirmation and approval [of the new rate]" (C.A. App. 93, 127, 157). Since the Federal Power Commission no longer exists, the contracts obviously cannot be interpreted according to their "plain language."

[2]Respondents claim that our position that the contracts incorporate the language of the statute "would take away a vital procedural protection of the contract, namely complete administrative review prior to the new rates taking effect" (Br. in Opp. 14). However, respondents will receive a refund if a final rate is lower than an interim rate. Thus, all that they even arguably have lost is their "right" to benefit from delay in the implementation of a lawful rate increase. See Pet. 17-18.

rate, although confirmed and approved by the appropriate authority, is impermissible because the rate "has been made expressly subject to approval by some body, [and], pending that approval, the new rate is not yet an 'approved' rate, as that term is ordinarily understood" (Br. in Opp. 7-8). Respondents make the same argument concerning the Flood Control Act, claiming that the statutory requirement of "confirmation and approval" means that "no rate may be charged which is still subject to required confirmation and approval" (*id.* at 17). In addition, with respect to both the contract (*id.* at 11-12) and the statute (*id.* at 15-16), respondents rely upon their interpretation of prior administrative practice to support their position. Thus, respondents themselves cannot distinguish the statutory issue from the question of the interpretation of the contracts.[3] In sum, it cannot seriously be contended that the issue in this case is

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[3]Respondents assert that their interpretation of the contracts is supported by "consistent judicial interpretation * * * of similar contractual terms" (Br. in Opp. 12), but the cases upon which they rely (*id.* at 8-12) are completely irrelevant to the issue presented here. Most of these decisions address whether a particular contract allowed a private utility to effect a unilateral rate increase by utilizing the procedures of Section 205 of the Federal Power Act, 16 U.S.C. 824d. This statute, and the underlying regulatory process, is totally different from the provision of the Flood Control Act governing rate changes. Whether some contractual term permitted a rate increase under the Federal Power Act therefore is not at all relevant to the question whether the contracts here should be found to incorporate the provision of the Flood Control Act concerning rate increases. The two cases that even tangentially relate to the Flood Control Act—*Associated Electric Cooperative, Inc.* v. *Morton*, 507 F.2d 1167 (D.C. Cir. 1974), cert. denied, 423 U.S. 830 (1975), and *Arkansas Power & Light Co.* v. *Schlesinger*, Civ. No. 79-1263 (D.D.C. Oct. 20, 1980), appeal dismissed, No. 80-2573 (D.C. Cir. Jan. 26, 1981)—do not concern the legality of interim rates under the statute or under a contract entered into pursuant to the statute. *Associated Electric Cooperative* related to the validity of a transmission service charge and *Arkansas Power & Light Co.* involved the interpretation of a contract that permitted only one rate increase in any five-year period.

solely a question of contract interpretation. The courts below imposed an unjustified restriction upon the Secretary's rate-setting authority and review by this Court is warranted to correct that error.[4]

2. Respondents' arguments concerning the interpretation of the statute are addressed in our petition (Pet. 10-16). The statute by its terms does not require "final" approval of a rate before the rate may be placed into effect, and there is no basis for implying such a requirement in the face of contrary congressional policy, administrative interpretation, and prior administrative practice. In addition, it is noteworthy that even respondents do not attempt to defend the Court of Claims' view (Pet. App. 10a) that approval by the Federal Energy Regulatory Commission is required in order to place new rates into effect.

3. a. Respondents assert (Br. in Opp. 22-23) that there is no conflict among the courts of appeals with respect to the question presented for review. That assertion is, of course, demonstrably incorrect. The decisions below squarely conflict with the Fifth Circuit's decision in *United States* v. *Tex-La Electric Cooperative, Inc., supra*, with respect to the interpretation of the statute (compare Pet. App. 3a n.* & 10a-13a, 14a-16a, with *id.* at 36a-49a, 51a-58a, 64a-65a), and, as a result, with respect to the meaning of the contracts (compare *id.* at 4a & 13a-14a, 17a-18a, with *id.* at 49a-50a).[5]

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[4]Even if the decisions below are construed as addressing only a question of contract interpretation, they conflict with the Fifth Circuit's determination in *United States* v. *Tex-La Electric Cooperative, Inc., supra,* that virtually identical contract provisions did not bar the interim rate increase (see Pet. App. 49a-50a).

[5]Amicus Sam Rayburn Dam Electric Cooperative, Inc., acknowledges that there is "an apparent conflict" between the circuits but suggests (Br. 10-11) that this conflict is unimportant because any action for a refund must be brought in the Claims Court. However, *Tex-La* was a lawsuit brought by the United States to collect interim rate increases from recalcitrant customers, and such actions may well be necessary in the future. Moreover, Congress did not invest the Federal Circuit with exclusive jurisdiction to define the Secretary of Energy's authority to set hydroelectric power rates; the decisions below, which amicus concedes raise an "importan[t] * * * issue of statutory control of administrative rulemaking for Flood Control Act rates" (Br. 9), should not be insulated from review by this Court simply because the issue arose in the context of a contract action. In addition, as amicus noted with respect to this issue in a prior petition for certiorari, "[i]n the present state of confusion * * * rate planning for hydropower customers is uncertain" (Pet. at 22, *Sam Rayburn Dam Electric Cooperative, Inc.* v. *United States*, cert. denied, No. 83-676 (Jan. 24, 1984)).

b. Respondents also claim (Br. in Opp. 23-25) that we have exaggerated the possible fiscal impact of the decisions below. The Department of Energy's estimate of a potential liability of $500 million (see Pet. 21) is based on the revenues collected pursuant to interim rate increases under the Flood Control Act and statutes with similar provisions from customers with contracts that incorporate the terms of the statute. Although additional claims have not yet been filed, it is a reasonable assumption that potential plaintiffs are awaiting the outcome of the proceedings in this Court before incurring the costs of commencing actions in the Claims Court. In addition, the participation of Sam Rayburn Dam Electric Cooperative, Inc., as amicus curiae in this case is itself the best evidence of the government's financial exposure. The government prevailed against Sam Rayburn in an action in the Fifth Circuit to collect the interim rate increase (see Amicus Br. 9), but if the decisions below stand Sam Rayburn clearly intends to relitigate the issue in the context of a refund suit (*id.* at 15). Sam Rayburn's disingenuous comments concerning possible defenses to such actions (*id.* at 18-19) cannot obscure the fact that the decisions below are an open invitation to all customers to

file lawsuits seeking refunds of payments made pursuant to interim rate increases.[6]

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Acting Solicitor General

JUNE 1985

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[6]Respondents intimate (Br. in Opp. 6, 23-25) that the government can avoid any future effects of the decisions below by changing the terms of its contracts. It is not clear that a contract provision expressly permitting interim rate increases would be effective in view of the determination of the courts below that the Secretary lacks the statutory authority to place such increases into effect. However, even if such a provision were effective, these decisions would encourage customers to refuse to include such an express authorization in their contracts. Thus, the Secretary would lose an important tool for managing hydroelectric rates (see Pet. 19-21).

DOJ-1985-06

AMICUS CURIAE

BRIEF

No. 84-1725

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
PETITIONER

v.

CITY OF FULTON, ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Federal Circuit

BRIEF *AMICUS CURIAE* OF SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC., IN OPPOSITION

RALPH J. GILLIS
Gillis & Campbell
Suite 227
160 Old Derby Street
Hingham, Massachusetts 02043
(617) 749-2432

ROBERT D. WILLIS
303 North Jackson Avenue
Livingston, Texas 77351
Attorneys for Sam Rayburn Dam Electric Cooperative, Inc.

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BRIEF *AMICUS CURIAE* OF SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC., IN OPPOSITION

Sam Rayburn Dam Electric Cooperative, Inc. (Sam Rayburn), *amicus curiae*, respectfully opposes the issuance of a writ of certiorari to the United States Court of Appeals for the Federal Circuit.[1]

[1] Letters of the parties giving permission to file this brief are on file with the Clerk.

Statement of Interest

Sam Rayburn is an incorporated Texas quasi-governmental entity[2] which purchases the federal hydropower output of Sam Rayburn Dam on the Angelina River, Texas, from the Southwestern Power Administration (SWPA). Sam Rayburn monitors the development of federal power rates (1) to insure rates are designed in accord with the Flood Control Act of 1944, Section 5, 16 U.S.C. 825s, for compliance with rate implementation, cost recovery, and widespread distribution criteria, and (2) to assure Department of Energy (DOE), SWPA compliance with congressionally set standards in sales of, and collections for such power and energy.

Summary of Argument

Traditionally the Federal Power Commission (FPC) collected federal hydropower rates under the Flood Control Act of 1944 by making them effective upon confirmation and approval by final agency action, as charged by Section 5. Without amendment to Section 5, the Secretary of Energy changed the traditional procedure after December 21, 1978, by purporting to make Flood Control Act rates effective *pending* final agency confirmation and approval action. The justification offered for this change is the additional binding charge of Section 5 that rates be designed to recover costs of dam construction and operation. Petition for Certiorari at 18-20 (hereinafter "Pet."). But, making so-designed rates effective on such a pre-final basis ignores the equally binding charge of Section 5: "rate schedules *to become effective upon* confirmation and approval". 16 U.S.C. 825s. (Emphasis added). There has been no administrative or judicial explanation as to how DOE can select among the charges of Section 5

[2] Sam Rayburn's members include the Cities of Jasper, Liberty, and Livingston, Texas, the Town of Vinton, Louisiana, the Sam Houston, Jasper-Newton, and Houston County Electric Cooperatives, the Sam Rayburn Municipal Power Agency, and Sam Rayburn G&T.

for those which it will ignore and those by which it will be bound. The effect of the Federal Circuit decision below correctly requires DOE to meet both statutory charges in its Flood Control Act rate implementations.

A. *Background*

In 1977 Congress created DOE in an effort to centralize energy policy making. 42 U.S.C. 7111(4). This centralization does not touch upon the substantive Flood Control Act, Section 5, rate implementation restriction traditionally met by the FPC, "rate schedules to become effective upon confirmation and approval". Rather, the DOE Act "transferred" the exercise of rate implementation functions previously vested in the FPC under several statutes.[3] Such transfer does not pass all rate implementation power to the Secretary of Energy. Rather, some FPC rate implementation functions are transferred to the Secretary (42 U.S.C. 7151(b)) while others are transferred to the Federal Energy Regulatory Commission (FERC) (42 U.S.C. 7171, 7172(a)). Such transfers effect no new rate-making authority, leaving the Secretary with only such authority as was transferred: While the transfer did not diminish the Secretary's authority (Pet. at 15), neither did it augment such authority.

Among the FPC functions transferred to the Secretary is rate implementation under the Flood Control Act, Section 5. Also transferred to the Secretary is the Section 5 rate design function previously exercised by the Secretary of the Interior (42 U.S.C. 7152). But the DOE Act directs the Secretary to exercise the rate design function through the Administrators of the five regional Power Marketing Agencies (PMA's) (42 U.S.C. 7152(a)(2)) thereby maintaining exercise of the Section 5 rate design function apart from the rate confirmation and approval function which the Secretary may exercise directly by final agency action. Compare Pet. at 11.

[3] The Government conceded there was only a transfer. Gov't Br. below at 22-23; Pet. at 10-11.

Regardless of the Flood Control Act's rate design function transfer, the FPC confirmation and approval function is specifically restricted to making designs effective *upon* confirmation and approval, which is final agency action as demonstrated by past agency practice. *Central Lincoln People's Utility District* v. *Johnson*, 735 F.2d 1101, 1107 (9th Cir. 1984); *United States* v. *Tex-La Electric Cooperative, Inc.*, (5th Cir. 1982) in Pet. Appendix E at 25a (hereinafter "App."). In contrast, FPC rate implementation under the Federal Power Act of 1935, Section 205, 16 U.S.C. 824d, and the Natural Gas Act of 1938, Section 4, 15 U.S.C. 717c, includes authority to place rates in effect before final agency action.[4] But the Flood Control Act regulates rate development and implementation for sales of hydropower by federal agencies to municipalities and cooperatives, while the Federal Power and Natural Gas Acts regulate investor-owned utilities and encounter substantially different considerations as evidenced by Congress' divergent approaches. See *United States* v. *Tex-La Electric Cooperative, Inc.*, 524 F.Supp. 409, 417 (E.D. La. 1981), *rev'd* 693 F.2d 392 (5th Cir. 1982), Sam Rayburn Appendix D at A-39, A-50 (hereinafter "SR App.").

Several other statutes governing sales of federal hydropower by PMA's restrict the FPC to making rates effective only upon confirmation and approval.[5] Rulemaking to set proposed rates under these statutes, as well as under the Flood Control Act,

[4] *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654-57 (1978); *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583-85 (1942); *The New England Divisions Case*, 261 U.S. 184 (1923), all show pre-final rate implementation with appropriate statutory language (unlike Section 5) as either an unlimited plenary grant of authority or a rate implementation mechanism which is unlimited, as do the state court decisions cited in Pet. at 15 n.15. The Petition is misleading. Pet. 14-15.

[5] The Bonneville Project Act of 1937, Section 6, 16 U.S.C. 832e, and the Columbia River Transmission System Act of 1974, Section 9, 16 U.S.C. 838g. In contrast, unlimited federal agency rate implementation authority without FPC review appears in the Reclamation Project Act of 1939, Section 9(c), 43 U.S.C. 485(c).

encounter a lengthy independent confirmation and approval process (previously at FPC, now at FERC) which delays speedy implementation of rates designed to meet the other Section 5 requirement of cost recovery. Aware of the prior delay situation with the FPC, and unable to obtain statutory language in the DOE Act for pre-final rate implementation, the Secretary decided to delegate final implementation authority to FERC while reading the DOE Act according to an internal memorandum prepared to support the proposition that pre-final rate implementation power is inherent in all rate-making authority.[6] As a result, Delegation Order No. 0204-33, 43 Fed. Reg. 60636-37, was issued by the Secretary for the disingenuous announced purpose of maintaining independent review of proposed rates as had existed under the Flood Control Act, Section 5.[7] More important, for the Secretary's rate implementation scheme, was the inclusion in that Delegation Order of "authority" for the Assistant Secretary for Resource Applications to implement rates proposed by the PMA's on a pre-final (ambiguously called "interim") basis pending final agency action (delegated simultaneously) on the proposed rates through FERC confirmation and approval. The Delegation Order is cited as empowering the Assistant Secretary to implement pre-final Flood Control Act rates. (Pet. at 13). But the Government quotes no statutory section empowering the Secretary with such pre-final rate implementation authority (Pet. at 13-15); it is wholly a creation of the self-serving memorandum and the follow-up Delegation Order, and, in respect to Flood Control Act rates, runs afoul of the Section 5 restriction, "rate schedules to become effective upon confirmation and approval".

[6] Memorandum from L. R. Coleman, General Counsel, to J. R. Schlesinger, Sec. of Energy (Oct. 14, 1978) (a staff attorney is the true author).

[7] Congress has in fact preserved independent review by (1) transferring exercise of the FPC confirmation and approval function to the Secretary, while (2) transferring exercise of the rate design function to the PMA Administrators. 42 U.S.C. 7151(b), 7152(a). Notably the Government consistently fails to mention this. Compare Gov't Br. below at 19, 29.

The fundamental legal problems with such delegation are (1) that the Secretary has no independent authority to implement rates, he is limited to the authority set out in the particular power marketing statute being applied,[8] (2) that the Flood Control Act, Section 5, specifically and substantively restricts rate implementation, "rate schedules *to become effective upon* confirmation and approval" (emphasis added), thereby preventing pre-final rate implementations, and (3) that the existence of merged, integrated, or separate rate-making functions does not bear on this substantive restriction. The Government has consistently tried to argue for plenary rate-making power by merger (now "integration") of Flood Control Act rate-making functions under the DOE Act. (Pet. at 12-13). In fact such integration or merger is immaterial to the Section 5 substantive limitation on implementation of the rate set by final rulemaking.

B. *Issue-Related Litigations*

The decision below should be understood in the context of several issue-related litigations. After initial implementation of pre-final rates by the Government in the spring of 1979, two unsuccessful refund suits were brought under the Bonneville Project Act of 1937, Section 6, 16 U.S.C. 832e.[9] *Montana Power Company* v. *Edwards*, 531 F. Supp. 8 (D. Ore. 1981); and *Pacific Power and Light Company* v. *Duncan*, 499 F. Supp. 672 (D. Ore. 1980). Both suits were decided by the same judge upon the erroneous determination, and following the

[8] The Goverment has conceded this point in its brief to the Fifth Circuit at 41 in *United States* v. *Tex-La Electric Cooperative, Inc.*

[9] The Bonneville Project Act (BPA), Section 6, served as the model for the Flood Control Act, Section 5. Conference Report, H.R. Rep. No. 2051, 78th Cong., 2nd Sess. 7 (1944). The BPA Conference Report, H.R. No. 1507, 75th Cong., 1st Sess. (Aug. 12, 1937), makes no change in the House Report which states clearly that rate schedules are subject to confirmation and approval before being made effective. H.R. Rep. No. 1090, 75th Cong., 1st Sess. 3 (1937).

Government's line of argument, that the administrative powers given to the Secretary of Energy under the DOE Act, Section 402(a)(2), 42 U.S.C. 7172(a)(2), contain substantive pre-final rate implementation authority extended from the Natural Gas Act.[10] No appeals were taken.

A third customer suit was brought for pre-final rates implemented under the Reclamation Project Act of 1939, Section 9(c), 43 U.S.C. 485h(c), wherein the district court upheld the pre-final rate implementation. *Colorado River Energy Distributors Ass'n* v. *Lewis*, 516 F. Supp. 926 (D.D.C. 1981). Unlike the Flood Control Act, no language in the Reclamation Project Act's unrestricted general grant of rate-making authority requires confirmation and approval.

At about this same time, a fourth customer suit against the Government's illegal pre-final implementation of Flood Control Act rates succeeded. *Arkansas Power & Light Co.* v. *Schlesinger*, Civ. Act. No. 79-1263 (D.D.C. Oct. 20, 1980). The Government lost that suit because the language in its power sales contract prevented pre-final rate implementations against the customer (as do the contracts in this case but with different language). The statutory issue of Flood Control Act restrictions against pre-final rate implementation was not decided. Indeed at this juncture only the *Montana Power* and *Pacific Power* cases may be cited as dealing with the pre-final rate implementation issue under a restricted implementation statute, and the flawed legal reasoning of those decisions has been rejected even by the Fifth Circuit. *Tex-La*, App. E at 63a-64a.

In addition, the Government brought three unsuccessful litigations against electric cooperatives (including Sam Rayburn) in Texas and Louisiana to recover pre-final Flood Control Act rate increases which the cooperatives had refused

[10] This line of reasoning was exploded in several decisions (by the district courts in *Tex-La* and *Sam Rayburn*), but especially by the Fifth Circuit in *Tex-La*, App. E at 63a-64a. Compare Pet. at 9 where *Montana* and *Pacific Power* are implied to support or be approved by the Fifth Circuit.

to pay as illegally implemented. In each case, the separate district court judges independently determined (1) that the Flood Control Act, Section 5, requires final agency action before rates may be made effective, (2) that the DOE Act transfer of the FPC function under the Flood Control Act in no way removes the restriction on that function against pre-final rate implementation irrespective of merger, integration, or administrative procedure, and (3) that the Oregon district court was in error in regard to substantive rate implementation authority being granted through the extension of administrative powers under the DOE Act. *United States* v. *Tex-La Electric Cooperative, Inc.*, 524 F. Supp. 409 (E.D. La. 1981), *rev'd* 693 F.2d 392 (5th Cir. 1982) (SR App. D. at A-39); *United States* v. *Northeast Texas Electric Cooperative, Inc.*, Civ. Act. No. 81-604 (S.D. Texas Dec. 9, 1981), *rev'd* 693 F.2d 392 (5th Cir. 1982); and *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, Civ. Act. No. H-80-1781 (S.D. Texas, Memorandum August 13, 1982 (S.R. App. A at A-1), in support of Final Judgment Oct. 26, 1982) (S.R. App. B at A-35), *revoked* (Order Feb. 15, 1983) (SR App. C at A-37).

While the district court actions in *Tex-La*, *Northeast*, and *Sam Rayburn* were pending, four municipal customers, the Cities of Fulton, Lamar, Thayer and Piggot, also successfully sued the Government in the Court of Claims for refund of pre-final rates collected in violation of the Flood Control Act, Section 5. *City of Fulton* v. *United States*, 680 F.2d 115 (Ct. Cl. 1982) (App. B at 5a). Before the *Fulton* decision was issued, summary judgment had been entered against the Government's pre-final rate implementations by the district courts in *Tex-La* and *Northeast*. And, the *Tex-La* district court decision was cited with approval by the Court of Claims in *Fulton*. App. B at 17a. After *Fulton* was decided by the Court of Claims, summary judgment again was ruled against the Government by the district court in *Sam Rayburn* (SR

Apps. B & C). Unfortunately, the Fifth Circuit Court of Appeals subsequently reversed *Tex-La* and *Northeast*, consolidated on appeal, (*United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F.2d 392 (5th Cir. 1982) (App. E at 59a)), noting at oral argument that it would not mind being in conflict with the Court of Claims in *Fulton*, and writing that the *Fulton* court misread the DOE Act. (App. E at 59a). Notably, the Fifth Circuit inaccurately writes that Tex-La had conceded the ultimate issue of pre-final rate implementation. (App. E at 59a). Tex-La and Northeast did not seek a writ of certiorari.

Thereafter, upon motion by the Government, the district court in *Sam Rayburn* reluctantly revoked its judgment against the Government, and issued a new judgment for the Government on April 25, 1983, but in doing so noted both its disagreement with the Fifth Circuit and that revocation was granted only because the district court must follow precedent (Order Feb. 15, 1983) (SR App. C at A-37). That is a strong statement from the district court, and indicates the importance of the instant issue of statutory control of administrative rulemaking for Flood Control Act rates. Sam Rayburn took an appeal to the Fifth Circuit where, without cautionary review, the district court's second judgment was affirmed relying on the Fifth Circuit's earlier decision in *Tex-La*. *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, 712 F.2d 144 (*per curiam* 1983). Sam Rayburn's petition for rehearing was denied on September 13, 1983. Subsequently Sam Rayburn filed an unsuccessful petition for a writ of certiorari. *Sam Rayburn Dam Electric Cooperative* v. *United States*, __ U.S. __, 79 L.Ed. 230 (Jan. 23, 1984).

More recently, the Claims Court issued its unreported judgment of January 20, 1984, in *Fulton* v. *United States*, awarding damages to Fulton under the Court of Claims' decision for the Government's breach of contract in collecting pre-final Flood Control Act rates. App. C at 19a. The Government

took appeal from that award to the Federal Circuit and challenged the Court of Claims' decision. The Federal Circuit, below, noted its agreement with decisions against the Government by the Court of Claims in *Fulton*, 680 F.2d 118 (which cites the *Tex-La* district court for authority, App. B at 17a), and by the district court in *Sam Rayburn* (Memorandum Aug. 13, 1982)(SR App. A at A-1). *Fulton*, App. A at 2a-4a. The special significance of the decision below is that the Claims Court, and the Federal Circuit on appeal, will be the *fora* for any suits brought for refund of illegally collected pre-final rates. The Fifth Circuit *Tex-La* decision has been mooted as to its effect on future litigations under the decision below.

Argument

The writ should not be granted, regardless of any apparent conflict with the Fifth Circuit's decision in *Tex-La*, (a) because the Claims Court, and the Federal Circuit Court, are the *fora* where all litigations for refunds of illegally collected hydropower rates must be brought, (b) because the Federal Circuit was aware of the *Tex-La* decisions, the Court of Claims *Fulton* decision, the *Sam Rayburn* decisions, and decisions in all other issue-related litigations when it rendered the decision below invalidating assessment of pre-final Flood Control Act rates, (c) because the Federal Circuit had Sam Rayburn's petition for a writ of certiorari to the Fifth Circuit (No. 83-676) and the Government's memorandum in opposition before it when rendering the decision below, and (d) because the Federal Circuit decision below is correct and works no injury to the Government contrary to the misleading arguments in the Petition.

1. There is an apparent conflict with the Fifth Circuit decision in *Tex-La*, but because the Claims Court and the Federal Circuit will be the *fora* for any refund claims it is a conflict without impact on future litigation and thus such "conflict" does not merit the Court's attention.

2. The Government's Petition is an effort to argue *de novo* that there is authority for pre-final rate implementation under the Flood Control Act, Section 5.[11] Even the Fifth Circuit in *Tex-La*, on which the Government relies, found no such authority (App. E at 25a), which forced the judicial amendment of Section 5 by result-oriented extrapolation of immaterial portions of DOE Act legislative history to construct the needed legislative intent. App. E at 45a-50a. Moreover, the Government conceded below, and in *Tex-La* as well as in *Sam Rayburn*, that under the Flood Control Act only final rates were assessed before 1977.[12] Such is the controlling agency interpretation of the Flood Control Act which should be given deference.[13] See SR App. A at A-10—A-12.

Notably, the Government's use of "interim" becomes slippery in its attempt to develop an otherwise nonexisting administrative practice. Thus, four unique FPC decisions in the 1944-1977 period are cited as examples of the agency imple-

[11] Typical of Government arguments throughout these litigations is the statement purportedly paraphrasing and partially quoting the language of Section 5 to the effect that rates "would 'become effective upon confirmation and approval' ". Pet. at 3. If that were accurate, the parties would not be here. But Section 5 is not susceptible of such paraphrasing, and in fact reads "*rate schedules to* become effective upon confirmation and approval" (emphasis added to omitted words), which is a substantive limitation on the rate implementation power. *Tex-La*, 524 Supp. 409, 419 (E.D. La. 1981), *rev'd* 693 F.2d 392 (5th Cir. 1982), SR App. D at A-51, A-52, A-54. Notably the Government in its Petition, and consistently during these litigations has avoided discussing the Section 5 words of limitation, "to become effective upon".

[12] Gov't Br. below at 19; *Sam Rayburn* Memorandum, SR App. A at A-6.

[13] It is a settled matter of administrative law that consistent past agency practice, such as the FPC's in interpretation and application of Section 5, is to be given significant weight. *EPA* v. *Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980). Such agency interpretations are not to be suddenly changed. *United States* v. *Alabama Great Southern Railway Co.*, 142 U.S. 615, 621 (1892). Sudden reversals of agency interpretations to discover new authority are usually denied. *NLRB* v. *Bell Aero Space Co.*, 416 U.S. 267, 289 (1974); *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 512-14 (1949). And where agency interpretations are inconsistent with the statutory mandate, such as pre-final rate implementation, they are rejected. *NLRB* v. *Brown*, 380 U.S. 278, 291-92 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965).

menting "interim" rates. Pet. at 14-15. But the involved interims either were for rates implemented by final agency action in compliance with the Flood Control Act and subject to judicial review, or were illegal agency actions.[14]

3. The Fifth Circuit in *Tex-La* agreed with the defendant cooperatives on all issues except whether the DOE Act worked an amendment to the Flood Control Act, Section 5. App. E at 25a & n.2. As such, the point of divergence between the Fifth Circuit and the Federal Circuit below must be whether such an amendment was effected. Thus the Federal Circuit writes that (App. A at 3a n.*):

> For the proposition that in transferring both the rate formulation and rate approval functions to the Secretary of Energy there was no creation of a power to implement interim rates, we rely in particular on the reasoning of the district court in *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, No. H-80-1781 (S.D. Texas August 13, 1982), *vacated and judgment for plaintiff*

[14] The Court of Claims examined these administrative decisions and wrote:

> In summary, our review of the history of administrative practice under the Flood Control Act, considered as a whole, does not support the Government's view of FPC rate confirmation and approval. Significantly, we are unable to discover a single instance in the period 1944-77 in which FPC, pursuant to the Flood Control Act, approved on an *interim* a rate increase sought by the SWPA. Moreover, it was clearly the practice of the Secretary of the Interior, consistent with contractual requirements, to seek final confirmation and approval of rates by the FPC before making them effective. App. B at 16a.

In regard to the same administrative decisions the district court in *Sam Rayburn* wrote:

> However, administrative construction does not control the court's decision as to the proper interpretation of the law, and where manifestly wrong or clearly erroneous it will not be followed but will be rejected.* * * This Court finds the prior rulings by the FPC are indeed inconsistent with the statutory mandate of Section 5 of the Flood Control Act, and, further, this Court cannot "rubber-stamp" an affirmance of those decisions. SR App. A at A-11 - A-12.

> *entered*, No. H-80-1781 (S.D. Texas April 25, 1983) (pursuant to *United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F.2d 392 (5th Cir. 1982), *aff'd* 712 F.2d 1414 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 997 (1984).

By adopting the *Sam Rayburn* Memorandum the Federal Circuit found that there is no amendment to Section 5:

> Plaintiff [United States] in the present case recognizes that prior to the enactment of the DOE Act, the rates developed by the Secretary of the Interior did not become effective until they were confirmed and approved by the FPC. (Plaintiff's Memorandum at 6, May 12, 1981). But plaintiff contends that the relevant transfer provisions of the DOE Act somehow altered that procedure, that the DOE Act eliminated the original bifurcated process when it vested both rate establishment and approval authority in the Secretary of Energy. It is important to note that in each of the three provisions analyzed above the word "transferred" is consistently used. The verb transfer is defined "to convey or remove from one place, person, etc., to another; pass or hand over from one to another; to make over the possession or control of (as, to transfer a title to land); sell or give." Black's Law Dictionary 1669 (4th ed. 1968). Thus, the thing transferred is not changed, enlarged or altered. It is passed from one to another. SR App. A at A-6.

a. The DOE Act transfers to the Secretary of Energy "the function of the Federal Power Commission". 42 U.S.C. 7151(b). There is no change or amendment of the FPC function, and the legislative history confirms that no amendment is intended. Thus, the intent of Congress is not thwarted (*contra* Pet. at 8).[15] Moreover, only that part of the FPC function

[15] The DOE Act Conference Report, H.R. Rep. No. 95-539, 95th Cong., 2d Sess. 65 (1977), in pertinent part reads:

> The conference substitute transfers to the Secretary all functions of the Federal Power Commission, except those transferred to or vested in the Federal Energy Regulatory Commission in Section 402 of the bill.

not transferred directly to the FERC is transferred to the Secretary. 42 U.S.C. 7151. *Accord*, *Tex-La*, App. E at 30a-31a, 41a. Thus, the Secretary holds less than the full FPC function; even the Flood Control Act rate design function is directed to be exercised by the PMA Administrators. 42 U.S.C. 7152(a)(2). Further the administrative powers of Section 402(a)(2), extended to the Secretary by Section 301(b), do not contain substantive rate-making authority (42 U.S.C. 7151(b), 7172(a)(2)), and the administrative powers conferred by the DOE Act, Section 664, 42 U.S.C. 7254, do not contain rate-making authority. In fact the Secretary is enjoined under Section 501 of the DOE Act to follow the procedural requirements set out in the statutes containing the transferred powers. 42 U.S.C. 7191(a)(1). *Contra* Pet. at 12.[16] Therefore, the decisions of the Federal Circuit and the Court of Claims are not contrary to the plain language of the DOE Act. *Contra* Pet. at 10. Indeed, the Court of Claims wrote:

> Specifically the Government contends (1) that section 7151(b) places the rate-making authority of the former FPC (including the assumed power to effect interim rates) in the Secretary of Energy.*** Significantly, many of the rate approval functions of the FPC were transferred to the FERC in subchapter IV, such administrative review to be exercised *independently* of the Secretary of Energy. The first sentence of 42 U.S.C. § 7151(b), therefore, does not clearly provide a statutory basis for the Secretary of Energy's claimed authority to adopt an interim rate increase for SWPA customers.***

[16] The district court wrote in the *Sam Rayburn* Memorandum:

> Accordingly, this Court concludes that both functions were transferred to the Secretary of Energy and that the original bifurcated process established by Section 5 of the 1944 Act was not discarded or altered but was transferred *in toto* to the Secretary of Energy. That transfer created no power to establish and collect an increased amount for the sale of the energy between the time the increase is proposed and the time it is approved. In short, there was no creation of a power to implement an interim rate. SR App. A at A-14.

> Moreover, the Government's argument that the Secretary of Energy was empowered by the DOEA to implement interim rates under the Flood Control Act ignores an explicit provision of the DOEA [Section 501, 42 U.S.C. 7291(a)(1).]*** Under section 5 of the Flood Control Act, confirmation and approval of the FPC was required *prior* to the implementation of any rate increase for SWPA customers. App. B at 10a-12a.

b. Contrary to the implication of the Petition (at 12-13), the legislative history of the DOE does not discuss either rate implementation or amendment of the Flood Control Act, Section 5. Nonetheless, the Fifth Circuit opinion in *Tex-La* goes to extraordinary lengths to uncover a legislative history which would support such an amendment to the Flood Control Act. *Tex-La*, App. E at 45a-50a, 60a-63a. In so doing, the Fifth Circuit candidly indicated that it was interpreting the DOE Act, and doing so despite clear statutory language. App. E at 30a, 48a-49a. Such action is a transgression of the principle against judicial legislation. *Griffin* v. *Ocean Contractors*, 458 U.S. 564, 570 (1982). The DOE Act legislative history evidences only an intent to transfer FPC functions, not to amend their substantive limitations, and neither the Government nor the Fifth Circuit have supplied any citation to the contrary. Consequently, the transfer language of the DOE Act, Section 301(b), is not at odds with the legislative history so as to support such an amendment. 42 U.S.C. 7151(b). See *Griffin*, 458 U.S. 570-71. And the legislative history relied upon by the Fifth Circuit in *Tex-La* deals only with the centralization of energy policy-making, not with creating some new plenary rate-making authority. App. E at 45a-50a, 60a-63a. So important a creation, if congressionally intended, would hardly have been omitted from the DOE Act.

4. The Government has sought to pull plenary rate-making authority out of a hat formed by "integration" (formerly "merger" as argued in other courts) of the rate

design and rate confirmation and approval functions of the Flood Control Act in the Secretary. Pet. at 12-13, 15. Such integration or merger is said to give plenary rate-making authority ("complete authority" Pet. at 13). But it is not the separation of functions which restricts the rate-making authority—it is the substantive Section 5 restriction on the rate implementation function which is not altered by "integration" or "merger"; *i.e.*, "rate schedules *to become effective upon* confirmation and approval". Emphasis added. The district court in *Tex-La* dealt with this:

> While the enactment in 1977 of the DOEA effected the consolidation of these three rate-making functions in the Secretary of Energy, these functions were not thereby expanded or altered. This transfer, contained in Sections 301(b) and 302 did not extinguish any restraints on the exercise of these functions or enlarge it. SR App. D at A-51.

5. The Government Petition, as with all its briefs in these litigations, rather than objectivity, reflects advocacy designed to protect its commercial interests in obtaining speedy rate implementation for sales of Flood Control Act hydropower.

a. The Government presents a circular argument as to the source of the Assistant Secretary's authority to place rates in effect pending final agency action. Thus, the Assistant Secretary is said to be empowered by delegation from the Secretary, but no statutory language is ever presented showing such "empowering" of the Secretary. In fact, the Government consistently avoids the limiting language of Section 5, "rate schedules to become effective upon confirmation and approval". This tactic is patent in the Government's statement that rates "would 'become effective upon confirmation and approval' ". (Pet. at 3). If the statute was so constructed, the parties would not be here, but the words of Congress omitted by the Government in fact cause Section 5 to limit rate implementations; "*rate schedules to* become effective upon confirmation and approval" (*omitted words emphasized*).

b. The Government presents "financial arguments" as to why it is required to place pre-final rates into effect as a measure to assure cost recovery as charged by Section 5. Pet. at 18-20. But those arguments focus on delays in rate implementation caused by DOE's own internal administrative muddle with FERC, and patently avoid meeting the equally binding charge of Section 5, "rate schedules to become effective upon confirmation and approval". The agency was not afforded an option by Congress as to which of the Section 5 charges it must meet; it must meet both.

c. The Government presents arguments about supplying an excess of administrative process by the pre-final rate implementation scheme, a process which would be upset if the Federal Circuit decision stands. Pet. at 16. The adequacy of the administrative process was not challenged below, is not challenged here, and has not been challenged in any of the other issue-related litigations. In fact, taking its cue from the Government brief, the Fifth Circuit in *Tex-La* spends much of its lengthy decision upholding an administrative process which was never placed in dispute. Sam Rayburn and the others only claim that Section 5 limits the implementation of the rate to the event of final agency action regardless of the rate development process. The current process may stand or be altered as the agency wishes, so long as the implemented rate is subject to prompt judicial review as the product of final rule making. In this regard, the Government had no answer for Judge Bissell below when questioned at oral argument as to why the agency simply did not appoint an entity other than the FERC to finalize proposed rates.

d. The Government makes the inaccurate and outrageous argument that it will be subjected to making $500 million in refunds unless the Federal Circuit decision should be reversed. Pet. at 9, 21. If the Government's illegal rate implementation action since 1977 has been to the extent of $500 million, there is every reason that persistence in such action be curtailed rather than judicially condoned. But the Government seems uncertain of its refund "defense" amount; in 1982 it told the Fifth Circuit that the exposure was a massive $800 million in refunds (*Tex-La*, App. E at 28a), and said the same to the Federal Circuit in 1984 (Gov't Br. below at 3 n.2), and, thus, as told to the Supreme Court, has apparently reduced its fictional exposure by at least $300 million. This unworthy argument is a patent flood gates scare tactic, persuading only the Fifth Circuit. App. E at 28a n.5. Notably, the Federal Circuit was aware that any refund actions would be brought in the Claims Court and, evidently, was persuaded that the Claims Court (or the Federal Circuit on appeal) could handle any such refund suits so as not to bankrupt the Flood Control Act federal power sales program. Indeed, if there was any substance to the flood gates arguments, the Government should have had success with the Federal Circuit, and it did not.

e. The refund "stampede" referred to by the Fifth Circuit (App. E at 28a n.5) and the Government (Pet. at 21) has not materialized despite the decisions both in *City of Fulton* v. *United States*, 680 F.2d 115 (Ct. Cl. 1982), and in *City of Fulton* v. *United States*, 751 F.2d 1255 (Fed. Cir. 1983), which find collections of Flood Control Act pre-final rates to be illegal. Indeed, there have been no refund actions filed, and Sam Rayburn is the only entity in a position to do so having protested the implementation of a pre-final rate against it effective June 16, through November 6, 1984.

More importantly, the Government has avoided telling courts that it has an equitable defense to any such refund

actions based on mutual mistake.[17] Thus, the Government and the power customers have received value, and the Government has changed its position expending amounts collected without protest in the mistaken belief that such collections complied with law. G. Douthwaite, *Attorney's Guide to Restitution* 45-50 (1977); 13 S. Williston, *Williston on Contracts* 540-41 (W. Jaeger ed. 3d ed. 1970); 3 A. Corbin, *Corbin on Contracts* 752, 757-59 (1960). No refunds are warranted under such circumstances, and even where pre-final rates are protested, the amount of any refund would be folded into the next rate so there is little point in refund suits. The flood gates have not been opened by the Federal Circuit decision below.

Conclusion

For the above-stated reasons, Sam Rayburn opposes the Government's petition for a writ of certiorari to the Federal Circuit.

Respectfully submitted,

RALPH J. GILLIS
Gillis & Campbell

ROBERT D. WILLIS

Attorneys for Sam Rayburn Dam Electric Cooperative, Inc.

June 1, 1985

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[17] Equitable defenses may be raised in the Claims Court. *Pauley Petroleum, Inc.* v. *United States*, 591 F.2d 1308, 1315-16 (Ct. Cl. 1979). A defense of mutual mistake is available to the Government against a claim for restitution of moneys paid. *1776 K Street Associates* v. *United States*, 602 F.2d 354, 357 (Ct. Cl. 1979).

SR APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA
v.
SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.

CIVIL ACTION NO. H-80-1781

[FILED AUG. 13, 1982]

C. Max Vassanelli, William Z. Elliott, and Leland Ware, Department of Justice, 10th & Pennsylvania Ave., N.W., Washington, D.C., attorneys for plantiff.

Ralph J. Gillis, 15 Main Street Extension, Suite 5, Plymouth, Massachusetts, attorney for defendant.

MEMORANDUM AND ORDER

The parties in the present case have submitted cross motions for summary judgment, and both agree there is no dispute as to any material fact. Therefore, it is for this Court to interpret the law dealing with the sale of hydroelectric power by a federal agency and correctly apply that law to the facts at hand. There are two major issues for decision: (1) whether the Secretary of Energy has the statutory authority to implement an interim rate increase before that increase has been finally approved, and (2) whether the terms of the parties' contract permits an interim rate to become effective before its final confirmation. For the reasons set out more fully below, the Court concludes that the defendant must prevail on both of these issues. Accordingly, the defendant's motion for summary judgment is granted, and that of the plaintiff is denied.

Background

The subject matter of this case is the sale of hydroelectric power by a federal agency, and the original statute which governed that process was Section 5 of the Flood Control Act of 1944. 16 U.S.C. §825s (1976). That statute vested the Secretary of the Department of the Interior with the responsibility for developing rates for the marketing of electric power and energy generated by reservoir projects constructed by the Department of the Army. The Southwestern Power Administration (SWPA) was established by the Secretary of the Department of Interior pursuant to Secretarial Order No. 1865 on August 31, 1943. Subsequently, the Secretary's power marketing responsibilities in the Southwestern Region of the United States, including Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas were delegated to SWPA.

A contract providing for the purchase and sale of all of the electric power and energy generated at the Sam Rayburn Dam was entered into by the parties on February 13, 1964. The term of the agreement initially covered a 20 year period which began on January 1, 1965, and extended through December 31, 1985. Service began on July 1, 1966. The agreement provided for the initial rate to extend through June 30, 1970, and it specifically authorized SWPA to revise the rates at five year intervals thereafter.

In 1977, the Department of Energy Organization Act, 42 U.S.C. §§7101, *et seq*. (Supp. 1980) (the "DOE Act") transferred the Department of Interior's power marketing responsibilities under the Flood Control Act to the Department of Energy (DOE). In addition, the Federal Power Commission's (FPC) responsibilities to confirm and approve rates developed by the Secretary of Interior under the Flood Control Act were also transferred to DOE by that statute. Subsequently, on December 21, 1978, the Secretary of DOE issued an order delegating the authority to establish rates under the Flood Control Act and to place such rates into effect on an interim basis to the Assistant Secretary for Resource Applications. 43 Fed. Reg. 60,636 (1978). By the same order, the authority for

final confirmation of such rates was delegated to the Federal Energy Regulatory Commission (FERC).

The United States, through SWPA, determined pursuant to a study that costs were not being recovered from its sales of hydroelectric power and energy. Consequently, SWPA redesigned the rate for such power and sought to implement the new rate against the defendant on an interim basis pending confirmation and approval by the FERC. The rate order in question in this case was issued on April 12, 1979, and stated that the rate increase would become effective on an interim basis on June 1, 1979, subject to subsequent confirmation by FERC. The defendant has refused to pay the rate increase because it contends that it was not liable for the new rate until it was confirmed by FERC.

On November 24, 1980, SWPA and defendant executed an amendment to the contract, extending the term of the agreement through December 31, 1995. Sam Rayburn has paid the interim rate increase for the period between November 1, 1980, and January 8, 1981, the date of final confirmation by the FERC. Consequently, plaintiff claims the difference between the old and new rates, approximately $29,858 per month, from June 1979 until November 1980.

Defendant contends that the date of final confirmation by the FERC is the true effective date for the new rate. Additionally, defendant argues that there is no statutory authority to support the contract amendment and that it is, therefore, unenforceable.

Statutory Authority

The origin of analysis is Section 5 of the 1944 Flood Control Act which grants the authority and outlines the general procedure to be taken in the sale of hydro-electric power by a federal agency:

> Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years.

16 U.S.C. §825s (1976). This section can be distilled into four basic statements. First, energy from reservoir projects, energy which is generated as the water flows over the dam, is to be delivered to and come under the control of the Secretary of the Interior. It is then his duty to dispose of, that is, to sell such power to consumers at the lowest possible rates which sound business practice will allow. Third, the rate schedule set by the Secretary of the Interior is to become effective *upon* confirmation and approval by the FPC. And finally, the Secretary is directed to set the rate at a level which will allow the government to recover the cost of producing and transmitting the power. It thus appears that the Secretary of the Interior, with regard to rates, was given two responsibilities: to design rates that not only would be fair to the consumer, being as low as practically possible, but also be sufficient to recover the costs of producing and transmitting the energy. The corresponding responsibility of the FPC was to examine the rates so designed by the Secretary and then to approve them if the two stated requirements were met. Section 5 establishes two separate and distinct functions: (1) the formulation of appropriate rate schedules by the Secretary of Interior, and (2) the confirmation and approval of rates by the FPC.

When the Department of Energy Act was passed in August 1977, these two functions were transferred under Subchapter III to the Department of Energy and specifically to the Secretary of Energy:

> Except as provided in subchapter IV of this chapter, there are hereby transferred to, and vested in, the Secretary [of Energy] the function [sic] of the Federal Power Commission, or of the members, officers, or components thereof. . . .

42 U.S.C. 7151(b) (Supp. 1981). This subsection tranferred to the Secretary of Energy all of the functions previously exercised by the FPC except those enumerated in subchapter IV of the Act. Accordingly, to know which functions were not transferred to the Secretary of Energy, we must examine the enumerated exceptions in subchapter IV, and in Section 402 there are listed those functions of the FPC which were transferred to the FERC rather than to the Secretary. The function concerning rates is contained in subsection (a)(1)(B):

> (a)(1) There are hereby transferred to, and vested in, the Commission the following functions of the Federal Power Commission or of any member of the Commission or any officer or component of the Commission:
>
> • • •
>
> (B) the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy, including determinations on construction work in progress, under part II of the Federal Power Act, and the interconnection, under section 202(b), of such Act, of facilities for the generation, transmission, and sale of electric energy (other than emergency interconnection);

42 U.S.C. 7172(a)(1)(B) (Supp. 1981). Upon a cursory reading, it appears that this section transfers from the FPC to the FERC all of the rate making functions, including the

primary role in confirmation and approval of rates discussed above. But closer scrutiny reveals a qualification. This section concerns the establishment, review, and enforcement of rates under part II of the Federal Power Act, and part II of that Act regulates investor-owned companies rather than federal power marketing agencies. A provision of that subchapter specifically excludes application to any federal or state agency.[1] Hence, Section 402 does not include in its enumerated exceptions the previously existing FPC authority to confirm and approve federal power marketing rates under Section 5 of the Flood Control Act; rather this authority is transferred to the Secretary under Section 301. *Accord Pacific Power & Light Co.* v. *Duncan*, 499 F. Supp. 672 (D. Ore. 1980).

Another major transfer was made under Section 302 of the DOE Act. The language very clearly states that all of the functions of the Secretary of the Interior under section 5 of the 1944 Act and all of the other functions of the Secretary of the Interior with respect to the various federal power marketing agencies were transferred to the Secretary of Energy.[2]

Plaintiff in the present case recognizes that prior to the enactment of the DOE Act, the rates developed by the Secretary of the Interior did not become effective until they were confirmed and approved by the FPC. (Plaintiff's Memorandum at 6, May 12, 1981). But plaintiff contends that the relevant transfer provisions of the DOE Act somehow altered that procedure, that the DOE Act eliminated the original bifurcated process when it vested both rate establishment and approval authority in the Secretary of Energy. It is important to note that in each of the three provisions analyzed above[3] the word "transferred" is consistently used. The verb transfer is defined "to convey or remove from one place, person, etc., to another; pass or hand over from one to another; to make over the possession or control of (as, to transfer a title to land); sell or give." Black's Law Dictionary 1669 (4th ed. 1968). Thus, the thing transferred is not changed, enlarged or altered. It is passed from one to another.

This literal interpretation is bolstered further by two ancillary provisions. The first is Section 501 which states:

> If any provision of any Act, the functions of which are transferred, vested or delegated pursuant to the chapter, provides administrative procedure requirements in addition to the requirements provided in this subchapter, such additional requirements shall also apply to actions under that provision.

42 U.S.C. §7191(a)(1)(Supp. 1981). This section deals with the procedures for issuance of rules, regulations or orders, and the quoted portion requires that in the promulgation of new rules the Secretary of Energy will be bound by the procedures contained in the acts from which his functions were transferred. Section 5 of the 1944 Flood Control Act required the bifurcated procedure of formulation and approval, and Section 501 confines the Secretary of Energy to that two-step process.

The second supporting provision is found in Subchapter VI, Administrative Provisions. Section 641 provides:

> To the extent necessary or appropriate to perform any function transferred by this chapter, the Secretary [of Energy] or any officer or employee of the Department may exercise, in carrying out the function so transferred, any authority or part thereof available by law, including appropriation Acts, to the official or agency from which such function was transferred.

42 U.S.C. §7251 (Supp. 1981). This type of language is commonly known as an administrative or "enabling provision." It enables the Secretary of Energy to exercise any authority necessary to perform the substantive functions transferred to him by the Act. In *Alaska Bulk Carriers, Inc.* v. *Kreps*, 595 F.2d 814 (D.C. Cir. 1979), *rev'd on other grounds, Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980), the Court of Appeals discussed a similar statute from the Merchant Marine Act of 1936. Section 207 of that Act allows the Secretary of Commerce to enter into such contracts or make

such disbursements as may "be necessary to carry on the activities authorized by" the Act. 46 U.S.C. §1117 (1970). The court stated,

> We think § 207 is what is commonly called a 'housekeeping statute', and a similar provision is found in nearly every administrative agency basic statute. It is a section which details the means and methods of implementation of specific powers which are granted elsewhere in the statute. It is not an independent grant of power in itself.

Id. at 835. A leading and often cited case on this same subject is *New England Power Co.* v. *FPC*, 467 F.2d 425 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974), which involved the administrative provisions from the Natural Gas Act and the Federal Power Act.[4] These provisions have the same "necessary or appropriate" language as does Section 641 of the DOE Act. The Court of Appeals for the District of Columbia explained,

> Both sections are of an implementary rather than substantive character. The cases have made abundantly clear that while these provisions must be read in a broad expansive manner, they can only be implemented 'consistently with the provisions and purposes of the legislation,' [cites omitted], and 'that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.' [cites omitted] These sections merely augment existing powers conferred upon the agency by Congress, they do not confer independent authority to act. *Mesa Petroleum Corp.* v. *FPC*, 441 F.2d 182 (5th Cir. 1971).

467 F.2d at 430. A third case from the District of Columbia is instructive on the subject.

> The substantive provisions of the [Natural Gas] Act contemplate certain procedures, as incident to the functions provided. The range of permissible procedures must be

> derived from these sections, sections like sections 4 and 5 of the Natural Gas Act, and the functions they describe. Section 16, which uses a broad generality of 'necessary or appropriate' that is not rooted in a function, cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined.

Mobil Oil Corp. v. *FPC*, 483 F.2d 1238, 1257 (D.C. Cir. 1973).

While it is true that the administrative statutes are to be broadly construed, *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968), the "housekeeping" or administrative provisions must relate to the authority given and functions prescribed in the substantive provisions. The agency or official must look first to the substantive provision to determine the authority or functions defined therein, and then through the administrative provision the agency may exercise the "necessary and appropriate" steps to carry out that function. The agency or official may not, therefore, enlarge the choice of permissible procedures or exceed the authority given in the substantive provision. "If [the Secretary of an Executive Department] by affirmative act exceeds his lawful authority or threatens to do so, to the injury of established rights, he may be enjoined, for in such circumstances he is not truly representing the Government." *United States Dept. of Agriculture* v. *Hunter*, 171 F.2d 793, 795 (5th Cir. 1949).

Section 641, the administrative provision of the DOE Act, allows the Secretary of Energy to exercise the authority which is necessary and appropriate in carrying out the functions transferred to him. However, as in Section 501, this authority is again qualified: The Secretary may exercise any authority "available by law ... to the official or agency from which such function was transferred." The authority to be exercised must have been previously available to the transferring official or agency.

This Court has not been directed to any case law prior to the enactment of the DOE Act which interprets Section 5 of the 1944 Act any differently from the above. Plaintiff has cited no cases but cites four agency rulings in which the FPC approved interim rates for power and energy marketed by federal agencies.[5] It is noteworthy that the few reported cases, (none of which deal with the question of interim rates), construing Section 5 have followed the bifurcated procedure. *See Associated Electric Cooperative, Inc.* v. *Morton*, 507 F.2d 1167 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 830 (1975). It is accurately stated that the FPC did, in fact, grant approval of rate increases for an interim period pending final action by the Commission, as illustrated by the four agency rulings. Generally, a federal court will defer to the agency's ruling on a matter within that agency's sphere of authority, and the construction given to a statute by those charged with its execution is not to be overturned unless it is clearly wrong. *Grigsby* v. *Department of Energy*, 585 F.2d 1069 (Emer. Ct. App.), *cert. denied*, 440 U.S. 908 (1979); *see Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367, 381 (1969). But these agency rulings are not binding on a court, nor do they establish precedent.

The construction of statutes and other laws is a matter which ultimately is solely for the courts. In an early case, *Western Union Teleg. Co.* v. *Brown*, 253 U.S. 97 (1920), Justice Holmes rejected the petitioner's argument that the courts were bound by the ICC's determination of the agency's rule and stated, "[T]he question is of the meaning of a statute, and upon that, of course, the courts must decide for themselves." 253 U.S. at 99. The courts show great deference to the interpretation given the statute by the officers or agency charged with its administration, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), and the construction given by the agency is an aid to the courts. The Supreme Court explained in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944),

> [T]he rulings, interpretations and opinions of the [particular agency] . . ., while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

323 U.S. at 140. However, administrative construction does not control the court's decision as to the proper interpretation of the law, and where it is manifestly wrong or clearly erroneous it will not be followed but will be rejected. There is a plethora of Supreme Court cases which have ruled or recognized that the principle which accords weight to interpretation of a statute by the agency entrusted with its administration is inapplicable insofar as the administrative construction is inconsistent or in conflict with the statute or the congressional purpose in enacting it.[6] And in accordance with this rule, the Supreme Court has also held that administrative agencies may not, under the guise of construction, restrict or enlarge the meaning of a statute. It was held in *Texas & P.R. Co.* v. *United States*, 289 U.S. 627, 640 (1933), that where a statutory body, in that case the Interstate Commerce Commission, has assumed a power plainly not granted, no amount of the Commission's interpretation is binding upon the court. The Supreme Court again ruled against an agency's enlarging the controlling statute in *SEC* v. *Sloan*, 436 U.S. 103 (1978). There the Securities & Exchange Commission argued that its consistent and longstanding practice of "tacking" more than one 10-day suspension order was valid under the statute. In rejecting the Commission's argument, the Supreme Court stated:

> While this [rule of deference] undoubtedly is true as a general principle of law, it is not an argument of suffi-

cient force in this case to overcome the clear contrary indications of the statute itself. . . . [T]he mere issuance of consecutive summary suspension orders, without a concomitant exegesis of the statutory authority for doing so, obviously lacks "power to persuade" as to the existence of such authority. *Skidmore* v. *Swift & Co.*, 323 u.[sic]S. 134, 140 (1944). Nor does the existence of a prior administrative practice, even a well-explained one, relieve us of our responsibility to determine whether that practice is consistent with the agency's statutory authority.

The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has "reasonable basis in law." [Cites omitted.] But the courts are the final authorities on issues of statutory construction, [cites omitted], and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' [Cites omitted.]

436 U.S. at 117-18. This Court finds that the prior rulings by the FPC are indeed inconsistent with the statutory mandate of Section 5 of the Flood Control Act, and, further, this Court cannot "rubber-stamp" an affirmance of those decisions.

United States v. *Tex-La Cooperative, Inc.*, No. 81-2813 (E.D. La. Sept. 8, 1981), is in accord with the present rationale and conclusion. That District Court in disallowing an interim rate increase held that such authority was never included in Section 5 of the Flood Control Act, nor was it contained in the DOE Act. "[T]he implementation powers transferred are no greater than those which existed prior to the transfer." *Id.* at 15. The District Court in *United States* v. *Northeast Texas Electric Cooperative, Inc.*, No. H-81-604 (S.D. Tex. Dec. 9, 1981), relied expressly on *Tex-La, supra*, for its ruling that an interim rate increase was prohibited.

Defendant in the case *subjudice* contends that the similarities in *Tex-La* bar the action by plaintiff on the basis of collateral estoppel. However, the courts of appeals traditionally have permitted federal agencies to relitigate substantially identical legal issues raised by different transactions or events, especially after adverse rulings elsewhere. *Western Oil & Gas* v. *United States*, 633 F.2d 803, 809 (9th Cir. 1980). Indeed, there are important policy considerations in allowing a different court to entertain the same legal issue. *See American Medical International* v. *HEW*, 677 F.2d 118 (D.C. Cir. 1981); *Divine* v. *Commissioner of Internal Revenue*, 500 F.2d 1041 (2d Cir. 1974), (allowing the agency to relitigate the same legal issue in another circuit). For these reasons, this Court declines to apply the doctrine of collateral estoppel but rather decides the case on its merits.

In summary, under the procedure established by the Flood Control Act of 1944, the Secretary of the Interior was to propose a rate that he viewed as reasonable to cover the costs of producing and transmitting the power but still as low as possible for the consumer. The function of the FPC was to discern whether or not the rate proposed by the Secretary of Interior had achieved that end. The process was essentially one of checks and balances, as the new rate could not become effective until it had been approved by the FPC. The various transferring statutes of the DOE Act vested the authority for both functions, formulation and approval, in the Secretary of Energy. Until he delegated the approval function to the FERC, the Secretary had the authority to propose rates for the sale of hydroelectric energy and the authority to confirm the rates as well. By virtue of these statutes, the Secretary of Energy could approve what he had proposed. This Court readily concedes that it does not always understand the reasoning or logic behind all of the enactments by the Legislature, but it is the role of the judiciary to interpret and apply the laws and not to question the wisdom of those who

made the laws. As the United States Supreme Court has stated, "[I]t is for Congress, not the courts, to write the law." *Standard* v. *Olesen*, 74 S. Ct. 768, 771 (1954). The legislative history does not reveal the intent behind the transfer of both functions to the Secretary of Energy, but as to the transfer of rate making to the FERC under Section 402,[7] the Legislature has stated that "[n]o single official should have the sole responsibility for both proposing and setting such prices." 1977 U.S. CODE CONG. & AD. NEWS (91st Stat.) 891. No such distinction was made where the sale of energy is by a federal marketing agency.

Accordingly, this Court concludes that both functions were transferred to the Secretary of Energy and that the original bifurcated process established by Section 5 of the 1944 Act was not discarded or altered but was transferred *in toto* to the Secretary of Energy. That transfer created no power to establish and collect an increased amount for the sale of the energy between the time the increase is proposed and the time it is approved. In short, there was no creation of a power to implement an interim rate.

Delegation

The Flood Control Act established the substantive authority for the actions in question. The approval authority, originally held by the FPC under the Flood Control Act, was transferred to the Secretary of Energy by Section 301(b) but was subsequently delegated to the FERC by Delegation Order No. 0204-33. 43 Fed. Reg. 60,636 (1978). Neither party contests the validity of this order, and indeed the DOE Act in Section 642 authorizes the delegation:

> Except as otherwise expressly prohibited by law, and except as otherwise provided in this Chapter, the Secretary may delegate any of his functions to such officers and employees of the Department as he may designate, and may authorize such successive redelegations of such functions within a Department as he may deem to be necessary or appropriate.

42 U.S.C. §7252 (Supp. 1981).

Attention is focused on this delegation because as a practical matter the approval authority now rests in the FERC. According to the tracing theory employed in the *Tex-La* case and used as a basis for this Court's decision, the function of approval and confirmation was first posited in the FPC, then transferred to the Secretary of Energy, and finally delegated to the FERC. Although no statute expressly provides for this authority to be exercised by the FERC, it was nevertheless validly conveyed to this entity by virtue of Sections 301(b) and 642 of the DOE Act, and by the implementing delegation order. The same delegation order conveyed the formulation authority to the Assistant Secretary for Resource Applications, 43 Fed. Reg. 60,636 (1978). Hence, the bifurcated procedure originated by the Flood Control Act is now exercised by two different entities. The Assistant Secretary must propose an appropriate rate, taking into consideration the factors found in Section 5 of the Flood Control Act, and the FERC must then approve the new rate before it can become effective.

Legislative History

The available documents to show congressional intent regarding rate-making under Section 5 of the Flood Control Act are sparse. The Court has studied the many committee reports from the House and Senate on this Act, but few of them relate directly to rate schedules and to implementation of rates. It is axiomatic that congressional intent is the guidepost to judicial interpretation of federal statutes. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). And, where the interpretation of a particular statute at issue is in doubt, the express language and legislative construction of another statute not strictly *in pari materia* but employing similar persons, things, or cognate relationships may control by force of analogy.

Stribling v. *United States*, 419 F.2d 1350, 1352 (8th Cir. 1969). Section 6 of the Bonneville Project Act of 1937 contains the same bifurcated procedure as found in Section 5 of the Flood Control Act, and in part it provides:

> Schedules of rates and charges for electric energy produced at the Bonneville project and sold to purchasers as in this chapter provided shall be prepared by the administrator and become effective upon confirmation and approval thereof by the Federal Power Commission. . . .

16 U.S.C. §832e (1976).

The report from the Committee on Rivers and Harbors states in its specific analysis of sections of the bill that "[r]ate schedules and revisions thereof shall from time to time be prepared and *submitted* by the Administrator [the official in charge of transmission and distribution of the surplus electric energy] to the Federal Power commission" and "such rate schedules shall become effective as approved by the Federal Power commission." [sic] H.R. REP. NO. 1090, 75th Cong., 1st Sess. 509 (1937). (emphasis added). The word "submitted" is significant because it intimates that the rate schedule so proposed is not final but that it is being given to the FPC for its scrutiny.

The Bonneville Project Act was amended in 1945, although the sections on rate schedules were not significantly changed, and the committee report states, "Sections 2 and 3 are technical amendments to authorize the Administrator to dispose of energy to other Federal agencies and to do so *at rates approved by the Federal Power Commission*." H.R. REP. NO. 777, 79th Cong., 1st Sess. 874 (1945) (emphasis added). The Administrator would be allowed to dispose of the energy only at rates approved by the FPC. This report refers to the Flood Control Act in its sectional analysis where it states, "The dispositions authorized will be on the same basis as sales, namely, at rates approved by the Federal Power Commission. This accords with the policy incorporated in recent bills and

acts, including the Flood Control Act (PUBLIC LAW 534, 78th Cong.) enacted last December." *Id.* at 876. As with the Flood Control Act, there are no reported cases construing Section 6 of the Bonneville Project Act.

To analyze the reports, the Court considers three points: (1) that the official was to *submit* the proposed rate schedule to the FPC, (2) that the 1945 amendment did not change this procedure, and (3) that the 1945 report directly compares the Bonneville Project Act to the Flood Control Act. From these considerations it appears that Congress intended that the official designing the rate schedule would submit such schedule to the FPC for its approval before that rate would become effective.

Lastly, the House Committee on Flood Control reported to Congress in 1944 that the primary purpose of the Flood Control Act was to alleviate the serious flooding problems and damage done by torrential downpours of rain in the early 1940's. The only slight reference to hydroelectric energy was a statement of practicality:

> The plans are comprehensive in scope and contemplate the most practicable and economical method of providing flood control, and, where practicable, of conserving the flood waters for beneficial uses. In each case, they have been planned with a view to producing the greatest good to the greatest number of people. The plans include multiple-use reservoirs which will permit the development of economical hydroelectric power in addition to providing storage for flood control, irrigation, water supply pollution control, and other purposes.

H.R. REP. NO. 1309, 78th Cong., 2d Sess. 1354 (1944). Thus, the thrust of this legislation was to provide security for the people of regions where flooding had been a problem and, as a matter of practicality, to use the resulting energy produced at the reservoirs. With no mention of implementation of rates, the only guidance that the Court has of the legislative in-

tent underlying the Flood Control Act is the clear language of the statute and the analogy to the Bonneville Project Act. This Court concludes that both of these sources clearly indicate that Congress intended that there be no interim rate increases but that any rate proposed by the named official, either the Secretary of Interior or the Administrator of the Bonneville Project, should be approved and confirmed by the FPC before it would become effective.

Reliance on FPC v. Natural Gas Pipeline Co.

The government relies heavily on the Supreme Court case, *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), to support its contention that interim rate authority is inherent in the general rate setting authority vested in the Secretary of Energy. In that case the FPC began an investigation of the two respondent gas companies' rates with a view towards determining whether they were just and reasonable. That determination involved many complex calculations which would take months of sifting through figures. Until this process was completed, the FPC issued an interim order directing that the rates be reduced and requiring that the respondents file new schedules to reflect the reduction. The Court of Appeals for the Seventh Circuit upheld the Commission's authority under the statute to issue the interim order but vacated the order on grounds related to going concern value and amortization. Although the Supreme Court resolved several issues, the only one pertinent to the case *sub judice* is the validity of the interim order.

There is persuasive language in *Natural Gas Pipeline* to support the plaintiff's position, and taken out of context that language would seem to end the controversy:

> The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discrimination and unfairness from its details.

Id. at 584. The gas companies in *Natural Gas Pipeline* contended that the FPC did not have the authority under the Act to enter the interim order at issue, and they argued further that the FPC itself had to fix the reasonable rate as required by the Act instead of directing the companies to file a new rate schedule. The substantive provision which controlled the resolution of that issue is Section 5 of the Natural Gas Act: "[B]ut the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 15 U.S.C. § 717(a) (1976). The Supreme Court found that this provision had been modeled after the provisions of the Transportation Act and that the corresponding sections under that Act had been interpreted as giving the ICC authority to enter an interim order in advance of a schedule to be filed later by the carriers. The Court ruled:

> [T]he provision of §5 already quoted contemplates that, when existing rates are found to be unjust and unreasonable, an order decreasing revenues may be filed without establishing a specific schedule of rates. Since such an order may be in the interests of the public, as well as the regulated company, and is in harmony with the purposes of the Act, it is one which the Commission has discretion to make under §16 as appropriate to carry out the provisions of the Act.

Id. at 585.

Natural Gas Pipeline can be distinguished on several points. First, the statute governing that case is for the purpose of regulating increased rates filed by investor-owned companies which market or transport natural gas. Section 5 of the Flood Control Act regulates the sale of hydro-electric energy by a governmental agency. A later Supreme Court decision construing the Natural Gas Act stated, "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." *FPC* v. *Hope Natural Gas*

Co., 320 U.S. 591, 610 (1944). As stated previously under *Legislative History*, this Court believes that the purpose of the Flood Control Act was to prevent destruction of lands and secondarily to make efficient use of the reservoirs constructed. More specifically, Section 5 allowed only the recovery of costs, whereas the Natural Gas Act allowed investor-owned companies to recover just and reasonable profits.

The second distinction is that the FPC entered an interim order that the rate was to be decreased. The FPC did not set the new lower rate but directed the gas company, pending further investigation by the FPC, to set the lower rate, one not "unjust, unreasonable and excessive." *Id.* at 580. In that instance the governmental agency was regulating a private corporation which it found to be overcharging the public. In the present instance, the governmental agency is not only the seller but also the entity regulating itself. Further, the rate is not being decreased but increased. The subject matter of the present dispute concerns not an interim order by the regulating body, as in *Natural Gas Pipeline*, but an interim rate increase by the seller.

A third distinction is that the Supreme Court in *Natural Gas Pipeline* had guidance from decisions construing a statute after which the Natural Gas Act was modeled. Similar statutory language had been interpreted in prior cases to allow the ICC to enter an interim order like the one issued by the FPC in *Natural Gas Pipeline*. There are no such guidelines in our case, and there are no exemplary cases construing a model statute.[8]

A final and important distinction is that Section 5 of the Natural Gas Act specifically gave the FPC the authority to order a decrease. Also, in Section 4, the Act allowed the FPC to suspend the operation of a new rate filed by a gas company up to five months pending a hearing by the agency. During this period the agency could enter an interim or temporary rate decrease. However, if the hearing was not concluded in five months, the new rate, on motion of the gas company,

would go into effect subject to refund for an unjust rate. 15 U.S.C. § 717c(e) (1976).[9] The provision controlling the present case has no such language. To the contrary, Section 5 of the Flood Control Act specifically directs that the rates are to be set by the Secretary of Interior, "to become effective upon confirmation and approval by the Federal Power Commission." The section relied upon in *Natural gas Pipeline*, [sic] Section 5 of the Natural Gas Act, allowed the FPC to order a decrease without any required confirmation or approval.

Plaintiff asserts that Section 16 of the Natural Gas Act is the statutory basis for the Supreme Court's ruling in *Natural Gas Pipeline*.[10] However, this provision is an administrative statute much like Section 641 of the DOE Act. As such, Section 16 is implementary, and it creates only the authority which is necessary to carry out Sections 4 and 5, the substantive provisions. A close reading of *Natural Gas Pipeline* reveals that it was Section 5, not Section 16, which governed the Court's decision.

Plaintiff compares Section 16 of the Natural Gas Act with Section 301(b) of the DOE Act which states:

> (b) Except as provided in subchapter IV of this chapter, there are hereby transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 7172 (a)(2) of this title to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence.

42 U.S.C. §7151(b) (1981). The first sentence is the foundation for the premise established in a preceding section, *Statutory Authority*, that the approval function of the FPC was transferred to the Secretary of Energy. It is the second sentence which is relevant to the present discussion. It allows the Secretary of Energy to exercise "any power described in

section 7172(a)(2)" which he deems necessary to carry out those functions that have been transferred to him. Accordingly, to understand what this second sentence means, Section 7172(a)(2) must be dissected as well.

Section 7172(a) (2) provides:

> (2) The Commission may exercise any power under the following sections to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission:
>
> (A) sections 4, 301, 302, 306 through 309, and 312 through 316 of the Federal Power Act; and
>
> (B) sections 8, 9, 13 through 17, 20, and 21 of the Natural Gas Act.

This provision lists twelve sections of the Federal Power Act and nine sections of the Natural Gas Act. These sections establish certain powers, all of which may be exercised by the Secretary of Energy through Section 301(b) of the DOE Act quoted above. However, none of these powers pertains to rate making or in any way gives the FPC, and derivatively the Secretary of Energy, rate making authority.[11] Therefore, plaintiff's reliance is misplaced when it concludes that sections 301 and 302[12] are "virtually identical" to the grant of authority which supported the interim order in *Natural Gas Pipeline*. It is true that the second sentence of Section 301(b) allows the Secretary of Energy to exercise the power necessary to carry out the functions transferred to him, but he is limited to those specific powers listed in 7172(a)(2). One must conclude that if authority to enter an interim rate increase is not contained in any of these provisions, it cannot be exercised by virtue of 301(b). There is no such power listed, and thus there is no such power granted to the Secretary of Energy by Section 301(b).

Plaintiff cites two subsequent Supreme Court decisions, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), and *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962). These cases have compelling language which at first blush ap-

pears to be conclusive on the matter of interim rates. "[T]here is 'no question' as to the Commission's authority to issue interim rate orders." *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. at 150 (1962). "[E]ntering the interim order was not only entirely appropriate but in the best tradition of effective administrative practice." *Id.* at 155. Yet, both of these cases rely exclusively on the authority established in *Natural Gas Pipeline*. Inasmuch as this Court has determined that *Natural Gas Pipeline* is inapplicable to the present cause, its progeny must likewise be rejected.

Two recent cases have relied on *Natural Gas Pipeline* to allow interim rate increases by the government. Both of these cases involve the application of Section 6 of the Bonneville Project Act of 1937, a statute very similar to Section 5 of the Flood Control Act. The Court in *Pacific Power & Light Co.* v. *Duncan*, 499 F. Supp. 672 (D. Ore. 1980), found that the agency had inherent or implied authority to implement the contested interim rates and supported that finding by quoting from *FPC* v. *Tennessee Gas Transmission Co.*, *supra*, and *FPC* v. *Hope Natural Gas Co.*, *supra*. This Court respectfully differs with the conclusion reached by the Oregon Court, and with deference it is submitted that those cases cited by that Court do not apply to the statutes at hand.

The Oregon Court again ruled in favor of the government in *Montana Power Co.* v. *Edwards*, 531 F. Supp. 8 (D. Ore. 1981). The Court stated, "Nonetheless, powers not explicitly granted can be inferred, despite some legislative history which suggests the contrary." *Id.* at 10. For this statement, the District Court relied on *United States* v. *Exxon Corp.*, 628 F.2d 70 (D.C. Cir.), *cert. denied*, 446 U.S. 964 (1980); and *Atlantic Richfield Co.* v. *United States Dept. of Energy*, 500 F. Supp. 1301 (E.D. Pa. 1980), *aff'd*, 655 F.2d 1118 (Emer. Ct. App. 1981). Both of these cases, as in *Natural Gas Pipeline*, involved statutes which regulate private industries in order to protect consumers against exploitation.[13] Section 5 of

the Flood Control Act is not a regulatory statute but a procedural one. It was enacted to guide the Secretary of Interior and FPC in arriving at appropriate rates. Further, in the *Exxon* case, the subpoena power in question had been expressly created by an earlier enacted statute. Yet, the interim rate-making power now in question never existed under Section 5. Finally, neither of the statutes in the two cases cited by the Oregon Court contained any limitation on procedure as Section 5 does. Accordingly, after careful consideration of the opinions issues by the Oregon Court, this Court must hold fast to its conclusion that there is no inherent or implied authority to enter the interim rate increase.

Contractual Authority

The contract binding the parties tracks the wording of the 1944 Flood Control Act, and the pertinent language states:

> Section 4. *Change in Payment for Hydro Power and Energy*. (a) at any time after July 1, 1970, and from time to time thereafter, but not oftener than once every five years, the schedule of compensation for the purchase and sale of "Hydro Power and Energy" set forth in Section 3(a) of this Article II may be increased or decreased by SPA, subject to the confirmation and approval of the Federal Power Commission. Any such new schedule of compensation shall become effective and applicable to the purchase and sale of "Hydro Power and Energy" under this Article II in accordance with and on the date specified in the order of the Federal Power Commission containing such confirmation and approval.

Article II, Section 4(a) of the Sam Rayburn-SWPA Contract No. 14-02-0001-1124 (February 13, 1964).

It is well established that the United States is bound by the terms of its contracts which are valid when entered into.

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

The Sinking Fund Cases, 99 U.S. 700, 719 (1879). The Supreme Court followed the principle of *The Sinking Fund Cases* in *Lynch* v. *United States*, 292 U.S. 571 (1934). At issue was the Economy Act of 1933 which authorized Congress to abrogate its responsibility under certain War Risk Insurance policies.

> Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.

292 U.S. at 580. "In other words, the need for money is no excuse for repudiating contract obligations." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977).

A case governed by Section 5 of the Flood Control Act dealing with a contract dispute is *Associated Elec. Cooperative, Inc.* v. *Morton*, 507 F.2d 1167 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 830 (1975). The issue was whether the existing rate schedule could be revised by adding a transmission charge to cover costs, which charge effectively eliminated certain credits due the plaintiff under the contract. The District of Columbia Circuit Court found that Section 5 required such recovery of costs even though the action incidentally decreased the amount credited to plaintiff. Additionally, the court found that the contract terms allowed such increase. The bifurcated procedure of rate proposal by the Secretary followed by confirmation from the FPC was used in *Associated Elec. Cooperative*. And, although interim rate making was not at issue, the principle gained is that both statutory and contractual authority are necessary to effect a valid rate increase.

A second case concerning a contract dispute and governed

by Section 5 of the Flood Control Act is *Arkansas Power & Light Co.* v. *Schlesinger*, No. 79-1263 (D. D.C. Oct. 20, 1980). In that case the plaintiff and SWPA entered into a contract for the sale of power whereby certain maximum rate increases were set. SWPA raised the rate above this maximum, and the Court ruled that this was a breach of contract, stating,

> The dictum in *Associated Electric Cooperative* is not authority for the proposition that the government can alter or repudiate a contract which was valid at the time it ws [sic] entered into, but later becomes disadvantageous because of changing economic conditions. Similarly, nothing in the legislative history cited to this court indicates that Congress intended the Flood Control Act to give the government authority to unilaterally alter existing contracts.

The same principle applies in the instant controversy. The government cannot alter or repudiate its contract, and the Flood Control Act does not give the government authority to unilaterally alter the existing contract because of changing economic conditions. To effect a valid rate increase, both parties must follow the terms of the contract.

A third important case dealing with the issue of contractual authority for rate increases is *Colorado River Energy Distributors Asso.* v. *Lewis*, 516 F. Supp. 926 (D. D.C. 1981). The issue there was whether the Secretary of Energy had authority under the Reclamation Project Act and under the terms of the contract to implement an interim rate increase for electric power sold. The language of Section 9(c) of the Reclamation Act is much broader than that of Section 5 of the Flood Control Act, and that statute leaves rate determination and implementation totally to the judgment of the Secretary without statutory restraint.[14] The District Court found both statutory and contractual authority for the interim rate increase.

> The Secretary's authority to enter into contracts or leases for the sale of power is provided in section 9(c). That power to contract is limited only by the specific terms of the statute. . . .
>
> Finding a general power to collect interim rates does not necessarily mean that such rates may be collected immediately from all customers. Terms on which the Secretary sells CRSP power are *governed by a contract*. The Secretary may not alter its terms unless the alteration is specifically contemplated by the contract or by statute. (Cites omitted).

Id. at 931-32 (emphasis added). To find that the interim rate increase was anticipated by the government and the plaintiff, the court looked to the relevant contract provision which stated:

> The rate schedule specified in this contract shall be subject to successive modification by the United States through the promulgation of superseding rate schedules. If at any time the United States promulgates a rate schedule superseding the rate schedule then in effect under this contract, it will promptly notify the contractor thereof. Said superseding rate schedule, as of its effective date, shall become effective unless the contractor . . . shall elect to terminate this contract. . . .

Id. at 932.

Unlike the contract between SWPA and Sam Rayburn Cooperative, this contract does not specify that the rate increase shall be subject to the confirmation and approval of the FPC. Rather, it states that the superseding rate shall become effective "as of its effective date" unless the contractor terminates the contract. Hence, both the statute and the contract terms in *Colorado River* are substantially different from the statute and contract governing the resolution of the present case. However, *Colorado River* teaches that the terms for the sale of power are governed by contract, and the Secretary may

not alter its terms unless the alteration is specifically contemplated by the contract or by statute. Such alteration was not contemplated by the Flood Control Act. Neither is it contemplated by the Sam Rayburn contract. Rather, Section 4 of the Sam Rayburn-SWPA contract states when the new rate schedule is to be effective: "Any such new schedule of the compensation shall become effective . . . on the date specified in the order of the Federal Power Commission containing such confirmation and approval." Not only is the new schedule "subject to the confirmation and approval of the Federal Power Commission", but it is abundantly clear that it will not be effective until such approval on the date in the confirmation order. No interim rate increase is allowed by this contract as the rate increase cannot be effective until it has been confirmed by the FPC.

In the section entitled *Delegation*, it was explained that the approval function was transferred by Section 301(b) to the Secretary and subsequently delegated by Delegation Order No. 0204-33 to the FERC. To effectively apply the terms of the contract, the requirement of confirmation by the FPC is not discarded. As with the statutory construction, the contract must be interpreted to require confirmation by the FERC rather than the FPC.

A final contract question is whether the amendment to the Sam Rayburn contract executed on November 24, 1980, is valid.[15] That amendment, if enforceable, would allow the plaintiff to temporarily circumvent approval by the FERC and to enter the interim rate increase it desires. But this would be contrary to the statutory mandate. "It is well settled that a Government agency cannot contract in derogation of its statutory powers." *United States* v. *City and County of San Francisco*, 310 U.S. 16, 28 (1940). Accordingly, the Court concludes that since the amendment does not conform to the bifurcated process required by Section 5 and by the DOE Act, it is invalid.

Conclusion

In view of the foregoing, this Court concludes that the interim order issued by the Assistant Secretary for Resource Applications on April 12, 1979, was contrary to statutory and contractual authority. Hence, the interim rate order is declared invalid. Moreover, the Court concludes that the contract amendment of November 24, 1980, is likewise in derogation of statutory authority, and it is declared void. The true and effective date for the increased rate is the date when the FERC issued it [sic] final confirmation of the increased rate, January 8, 1981. Accordingly, this Court holds that the defendant is not liable for any monies claimed by the plaintiff to be owing during the period between June 1, 1979, the purportedly effective date of the interim rate increase, and January 8, 1981. Further, the Court orders that the plaintiff shall refund to defendant the amounts paid pursuant to the November 24, 1980, contract amendment. Defendant has not filed sufficient information to allow the Court to determine the exact amount to be refunded. Thus, defendant is hereby directed to submit within 15 days the required information whereby the Court may determine this amount.

DONE at Houston, Texas, on this the 19th day of August, 1982.

/s/ Carl O. Bue, Jr.
United States District Judge

FOOTNOTES

[1] "No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto." 16 U.S.C. §824(f) (1974).

[2] "(a)(1) There are hereby transferred to, and vested in, the Secretary all functions of the Secretary of the Interior under section 825s of Title 16, and all other functions of the Secretary of the Interior, and officers and components of the Department of the Interior, with respect to -

(A) the Southeastern Power Administration;

(B) The Southwestern Power Administration;

(C) The Alaska Power Administration;

(D) the Bonneville Power Administration including but not limited to the authority contained in the Bonneville Project Act of 1937 and the Federal Columbia River Transmission System Act;

(E) the power marketing functions of the Bureau of Reclamation, including the construction, operation, and maintenance of transmission lines and attendant facilities; and

(F) the transmission and disposition of the electric power and energy generated at Falcon Dam and Amistad Dam, international storage reservoir projects on the Rio Grande, pursuant to the Act of June 18, 1954, as amended by the Act of December 23, 1963." 42 U.S.C. §7152(a)(1) (Supp. 1981).

[3] Section 301; 42 U.S.C. 7151(b) which transfers the FPC's approval function to the Secretary of Energy; Section 402; 42 U.S.C. 7172(a)(1)(B) which transfers other rate making authority from the FPC to the FERC; and Section 302; 42 U.S.C. 7152(a)(1) which transfers all the functions of the Secretary of the Interior under 16 U.S.C. 825s to the Secretary of Energy.

[4] Section 16 of the Natural Gas Act and Section 309 of the Federal Power Act contain identical language, and in part these provisions state:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. . . .

15 U.S.C. §7170 (1970); 16 U.S.C. §825h (1970).

[5] 6 FPC 407 (1947); 40 Fed. Reg. 1554 (January 8, 1975); 40 Fed. [Reg.] 29127 (July 10, 1975); and 42 Fed. Reg. 31292 (June 21, 1977).

[6] Morton v. Ruiz, 415 U.S. 199 (1974) (noting inconsistency with congressional purpose); Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958) (overruling a past agency practice found to be illegal under the statute); Estate of Sanford v. Commissioner, 308 U.S. 39 (1939) (applying deference rule where administrative construction is not in conflict with statute construed); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1938) (holding that an administrative regulation, which operates to create a rule out of harmony with the statute authorizing it, is a nullity); Houghton v. Payne, 194 U.S. 104 (1904) (stating that administrative construction, however long continued, must yield to the positive language of the statutes construed); Orchard v. Alexander, 157 U.S. 372 (1895) (recognizing that no administrative practice can nullify an Act of Congress).

[7] *See* Note 1, *supra*, with accompanying text.

[8] The language . Section 6 of the 1937 Bonneville Power Act parallels Section 5 of the Flood Control Act. *See* 16 U.S.C. §832*e* (1976). However, this Court has discovered no cases under the authority of the Bonneville Act to allow the Administrator to implement rate increases without the confirmation and approval of the FPC.

[9] Section 4 of the Natural Gas Act states in part:

> (e) Whenever any such new schedule is filed the Commission shall have authority, . . . to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, . . . may suspend the operation of such . . . schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; . . . the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. . . .

[10] Section 16 of the Natural Gas Act provides:

> The Commission shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.

15 U.S.C. §717o (1976).

[11] The powers granted under the Federal Power Act are summarized as follows:

Section 4 of the Federal Power Act lists the general powers of the FPC: (1) to investigate and collect data on water resources; (2) to determine by investigation the cost and investment of a licensed hydro project; (3) to cooperate with state and other federal agencies in the investigation; (4) to make public the information secured by the investigations; (5) to issue licenses for dams, hydro projects, transmission facilities, and the like; (6) to issue permits to enable applicants for licenses to secure the data; and (7) to issue such orders as are in the public interest to conserve and utilize the resources of the region. 16 U.S.C. 797 (1976).

Section 301 deals with records and cost-accounting procedures to be followed by the public utility companies, and it provides further that the FPC shall at all times have access to these records. 16 U.S.C. 825 (1976).

Section 302 provides that public utilities may be required by the FPC to carry depreciation accounts and that the FPC may fix the proper rate of depreciation of the classes of property. 16 U.S.C. 825a (1976).

Section 306 allows any person to petition the FPC complaining of acts done or omitted to be done by the public utility in contravention of the various statutes. 16 U.S.C. 825e (1976).

The FPC under Section 307 may investigate any facts to determine whether there has been or is about to be a violation of a provision of the chapter. This section also gives the members of the FPC the power to issue subpoenae and to invoke the aid of court to enforce any subpoena. Further, this section describes the proceedings to be carried on before the Commission. 16 U.S.C. 825f (1976).

Section 308 governs the hearings and rules of procedure of hearings before the FPC. 16 U.S.C. 825g (1976). Section 309 is the grant of administrative power allowing the FPC to carry out the substantive provisions set forth in other parts of the chapter. 16 U.S.C. 825h (1976).

Section 312 concerns the FPC's reports and decisions which may be made available to the public. 16 U.S.C. 825k (1976). Section 313 describes the circumstances and requirements for rehearings by the FPC and for judicial review. 16 U.S.C. 825l (1976).

Section 314 deals with restraining orders that may be issued by the Commission; 16 U.S.C. 825m (1976), and Section 315 is authority for demanding a forfeiture by a public utility which does not respond to the subpoena issued or submit required information. 16 U.S.C. 825n (1976). Finally, Section 316 is authority for the FPC to impose penalties for persons who willfully and knowingly violate the provisions of the chapter. 16 U.S.C. 825o (1976).

The sections in the Natural Gas Act are quite similar to those of the Federal Power Act, and they can be listed in a more condensed manner.

Section 8 deals with accounts and records to be kept by the gas companies; 15 U.S.C. 717g (1976). Section 9 involves the rates of depreciation of property; 15 U.S.C. 717h (1976); Section 13 is the provision allowing complaints

to be filed with the FPC where a person alleges a violation by a gas company; 15 U.S.C. 7171 (1976); Section 14 allows for the investigations of possible violations by the FPC; 15 U.S.C. 717m (1976).

Section 15 states the rules of procedure and manner of conducting hearings before the FPC; 15 U.S.C. 717n (1976); Section 16 gives administrative authority to the FPC to carry out the substantive duties outlined in other sections of the chapter; 15 U.S.C. 717o (1976); and finally, Section 17 provides that the FPC will cooperate with the state commissions in matters involving the transmission and sale of natural gas. 15 U.S.C. 717p (1976).

[12] Section 302 transfers the functions of the Secretary of Interior to the Secretary of Energy as discussed in the preceding section, *Statutory Authority*.

[13] The Petroleum Marketing Practices Act at issue in United States v. Exxon Corp., 628 F.2d 70 (D.C. Cir.), *cert. denied*, 446 U.S. 964 (1980), directed the Secretary of Energy, along with other appropriate agencies, to conduct a study of subsidization of wholesale and retail motor fuel sales by vertically integrated oil companies. 15 U.S.C. § 2841 (Supp. 1979).

The Entitlements Program construed in Atlantic Richfield Co. v. U. S. Dept. of Energy, 500 F. Supp. 1301 (E.D. Pa. 1980), *aff'd*, 655 F.2d 1118 (Emer. Ct. App. 1981), conferred upon the DOE the authority to allocate and control the price of crude oil and petroleum products sold by privately owned oil companies. 15 U.S.C. §753(a) (1976).

[14] Any sale of electrical power or lease of power privileges, made by the Secretary [of Interior] in connections with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will product [sic] power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per cent per annum, and such other fixed charges as the Secretary deems proper. . . 9/ [sic] U.S.C. §485h(c) (1964).

[15] The amendment states in full:

> Section 3. *Compensation to SWPA for Hydro Power and Energy*. (a) Sam Dam Co-op shall compensate SWPA each month for hydro power and energy purchased under this Contract at the rates and under the terms and conditions set forth in the applicable rate order covering this Contract, a copy of which is attached to this Contract identified as Exhibit "2", and by this reference made a part hereof, whether in effect on an interim basis or as finally confirmed and/or approved by the appropriate authority also having responsibility to so confirm and/or approve rates pursuant to the Department of Energy Organization Act. It is understood and agreed that the

rates and/or terms and conditions set forth in the said rate order may, upon confirmation and/or approval by the appropriate authority having responsibility to so confirm and/or approve rates pursuant to the Department of Energy Organization Act, and whether on an interim basis or as finally confirmed and/or approved, be increased, decreased, modified, or superseded, at any time, and from time to time, and that if so increased, decreased, or superseded, the rates and/or terms and conditions shall thereupon become effective and applicable to the purchase and sale under this Contract of hydro power and energy in accordance with and on the effective date specified in the order of the appropriate authority.

See Defendant's Brief, Appendix B.

SR APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
SAM RAYBURN DAM ELECTRIC
COOPERATIVE, INC.,
Defendant.

CIVIL ACTION NO. H-80-1781
[Filed Oct. 26, 1982]

FINAL JUDGMENT

This matter was taken under submission after a hearing on cross motions for summary judgment.

Now, therefore, pursuant to and for the written reasons of the Court contained in the Memorandum and Order of August 19, 1982, and the Order of September 20, 1982, on file herein, it is

ORDERED, ADJUDGED and DECREED:

FIRST, that there be judgement [sic] in favor of the defendant, Sam Rayburn Dam Electric Cooperative, Inc., and against the plaintiff, United States of America, dismissing said plaintiff's complaint on the merits.

SECOND, that *Part 3*, Section 3(a), of Contract No. 14-02-0001-1124-2 (November 25, 1980), is in derogation of statutory authority and declared void, the underlying Contract No. 14-02-0001-1124 (February 13, 1964) as otherwise amended by Contract No. 14-02-0001-1124-2 remaining in full force and effect between the plaintiff and the defendant.

THIRD, that the plaintiff shall pay to the defendants Sixty-six Thousand Four Hundred Fifty-eight and 84/100 Dollars

($66,458.84), which is the amount of increase that defendant paid under the invalid contract amendment. Further, interest shall be paid on that amount at nine percent (9%) per annum to run from and after the date of this final judgment.

DONE at Houston, Texas, this 26th day of October, 1982.

/s/ CARL O. BUE, JR.
United States District Judge

SR APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA
v.
SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.

C.A. NO. H-80-1781
[Filed Feb. 15, 1983]

ORDER

This Court entered an order on August 19, 1982, granting the defendant's motion for summary judgment and thereafter rendered a final judgment in the defendant's favor. The ruling denounced the Government's power to implement an interim rate increase for federally owned hydroelectric energy. After that decision, the Fifth Circuit reversed the district court from the Eastern District of Louisiana on a legal issue identical to the one *sub judice*, holding that such an interim rate increase was permissible. *United States* v. *Tex-La Elec. Co-op., Inc.*, 693 F.2d 392 (5th Cir. 1982). In justifying its decision, the Circuit Court explained, "Despite the implicit expression of the 'transferred but not changed' theory in sections 301(b) and 501(a)(1) of the Act, we hold that the unification of the two Flood Control Act functions in the hands of the Secretary in effect amends section 5 of the Flood Control Act to alter the strict procedural requirement of a bifurcated rate implementation scheme." *Id.* at 404.

This is, of course, contrary to this Court's rationale for its granting of summary judgment for the defendant. However, the Court is bound to follow the law of the Circuit, and, accordingly, the final judgment of October 26, 1982, must be set

aside. The Government's Motion to Vacate Final Judgment is granted. The Government shall submit a final judgment within twenty (20) days of receipt of this Order.

DONE at Houston, Texas, on this the 15th day of February, 1983.

/s/ Carl O. Bue, Jr.
United States District Judge

SR APPENDIX D

UNITED STATES of America

v.

TEX-LA ELECTRIC COOPERATIVE, INC.

UNITED STATES DISTRICT COURT
E. D. LOUISIANA
[524 F. SUPP. 409]

Civ. A. No. 80-2813.

Sept. 9, 1981

OPINION

ARCENEAUX, District Judge.

At the preliminary pre-trial conference held in this matter, it was stipulated by both parties that there are no disputed issues of material fact. Accordingly, the Court's decision relative to the parties' cross motions for summary judgment is dispositive of the case.

Oral argument was heard on April 22, 1981, and the parties were allowed to further supplement their numerous pre-trial memoranda.

Having reviewed the applicable law, the facts of the case, and the comprehensive memoranda submitted by both parties, IT IS ORDERED that the summary judgment of defendant Tex-La Electric Cooperative, Inc. (Tex-La) be GRANTED, and the corresponding motion of plaintiff be DENIED.

BACKGROUND

Section 5 of the 1944 Flood Control Act, 16 U.S.C. § 825s[1]

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[1] The 1944 Flood Control Act, Section 5, reads as follows:

"Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the

establishes the governmental functions which are to be exercised in the sale of federal hydropower from reservoir projects constructed by the Army. They include:

1) the transmission and disposal of power and energy;
2) the formulation of appropriate rate schedules; and
3) the confirmation and approval of rates.

From 1944 to 1977, the first two functions were exercised by the Secretary of the Interior, while the third was under the control of the Federal Power Commission (FPC).

In 1977, the Department of Energy Organization Act (DEOA), 42 U.S.C. § 7151 *et seq.*,[2] transferred the Depart-

most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts."

16 U.S.C. § 825s.

[2] Section 301(b) of the 1977 Department of Energy Organization Act reads as follows:

"(b) Except as provided in subchapter IV of this chapter, there are hereby transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 7172(a)(2) of this title to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence."

42 U.S.C. § 7151(b).

Section 302 of the 1977 Department of Energy Organization Act provides:

ment of the Interior's power marketing responsibilities and the FPC's rate confirmation and approval functions under the Flood Control Act to the Department of Energy. In December of 1978, the Secretary of Energy delegated his authority to establish rates under the Flood Control Act to the Assistant Secretary for Resource Applications. Delegation Order No. 0204-33, 43 Fed. Reg. 60636-37 (1978).[3] By the same order, the Secretary delegated authority for *final* confirmation of rates to the Federal Energy Regulatory Commission (FERC).

"(a)(1) There are hereby transferred to, and vested in, the Secretary all functions of the Secretary of the Interior under section 825s of Title 16, and all other functions of the Secretary of the Interior, and officers and components of the Department of the Interior, with respect to—

"(A) the Southeastern Power Administration;

"(B) the Southwestern Power Administration;

"(C) the Alaska Power Administration;

"(D) the Bonneville Power Administration including but not limited to the authority contained in the Bonneville Project Act of 1937 and the Federal Columbia River Transmission System Act;

"(E) the power marketing functions of the Bureau of Reclamation, including the construction, operation, and maintenance of transmission lines and attendant facilities; and

"(F) the transmission and disposition of the electric power and energy generated at Falcon Dam and Amistad Dam, international storage reservoir projects on the Rio Grande, pursuant to the Act of June 18, 1954, as amended by the Act of December 23, 1963.

"(2) The Southeastern Power Administration, the Southwestern Power Administration, the Bonneville Power Administration, and the Alaska Power Administration shall be preserved as separate and distinct organizational entities within the Department. . . ."

42 U.S.C. § 7152(a).

[3] Delegation Order No. 0204-33, 43 Fed. Reg. at pp. 60636-37 (1978), which in part reads as follows:

"1. There is hereby delegated to the Assistant Secretary for Resource Applications the authority to develop, acting by and through the administrators, power and transmission rates for the power marketing administrations, and the authority to confirm, approve, and place in effect such rates on an interim basis, for such period or periods as he may provide, subject to refund with interest as determined by the Federal Energy Regulatory Commission in accordance with Section 3 hereof. . . ."

The latter was created in 1977 as an independent entity in the Department of Energy.

The Southwestern Power Administration (SWPA) became, by order of the Department of the Interior, the agency responsible for the marketing of reservoir power in the southwestern region of the United States. This region includes Texas and Louisiana. A federal study, completed in 1978, determined that costs were not being recovered for SWPA's sales of hydroelectric power. On March 1, 1979, the Assistant Secretary for Resource Applications issued a rate order which increased power and energy rates for SWPA's customers, and placed the new rates into effect on an interim basis, subject to final confirmation by FERC. Order Confirming, Approving and Placing Rates in Effect on an Interim Basis, Rate Order No. SWPA-1 March 1, 1979, 44 Fed. Reg. 13068.

Tex-La, one of those customers, has refused to pay the interim rates until they receive final confirmation and approval by FERC. As a result of this refusal, plaintiff instituted this action pursuant to 28 U.S.C. § 1345. Jurisdiction and venue are uncontested.

There are two Tex-La/U.S. power sale contracts which are pertinent. The first, Contract No. 14-02-001-864 (# 864),[4] was

[4] Contract No. 864, as originally confected, provides in pertinent part at Section 2:

> "Tex-La shall purchase, receive, and compensate the Government for firm power capacity and associated energy purchased under Section 1 at the rates and in accordance with the terms and conditions of Rate Schedule 'F-1', a copy of which is attached hereto identified as Exhibit '1', and by this reference made a part hereof. It is understood and agreed that the said Rate Schedule 'F-1' may, *with the confirmation and approval of the Federal Power Commission*, be modified, amended, or superseded at any time and from time to time, and that if it is so modified, amended, or superseded, the new rate or rates shall thereupon become effective and applicable to the purchase and sale of firm power capacity and associated energy under this agreement *in accordance with and on the date of the order of the Federal Power Commission containing such confirmation and approval.*" Emphasis added.

The above contract was amended on January 5, 1968, adding a new Section 2:

entered into in 1358, and provides for the sale of "firm SWPA system power". This contract contains the provision that rates may be increased or decreased subject to confirmation and approval by the FPC. The second contract, Contract No. 14-02-0001-921 (# 921),[5] entered into in 1960, provides for the

> "(b) At any time after December 20, 1972, and from time to time thereafter, but not more often than every five years, the rates for the sale of firm power capacity and associated energy, as set forth in Subsection (a), above, may be increased or decreased by the Government, *subject to the confirmation and approval of the Federal Power Commission*. Any such new schedule of rates shall become effective and applicable to the purchase and sale of firm power capacity and associated energy under Section 1, hereof, *in accordance with and on the date specified in the order of the Federal Power Commission containing such confirmation and approval.*" Emphasis added.

[5] Contract No. 921 pertains to the sale of four specific types of power. The sections pertaining to compensation for each of these sales read as follows:

(a) Article I, Section 4:

> "At any time after May 31, 1985, and from time to time thereafter, but not oftener than once every five years, the schedule of compensation for the purchase and sale of Narrows Dam Power and Energy set forth in Subsections (a) and (b) of Section 3, above, may be reviewed and redetermined by SWPA and, *with the confirmation and approval of the Federal Power Commission*, modified, amended, or superceded. If so modified, amended, or superceded, the new schedule of compensation shall become effective and applicable to the purchase and sale of Narrows Dam Power and Energy under this Article I in accordance *with and on the effective date specified in the final order of the Federal Power Commission containing such confirmation and approval.*" Emphasis added.

(b) Article II, Section 5:

> "(a) Tex-La shall compensate SPA each month for Peaking Power Capacity and for Pecking Energy scheduled for delivery during the preceding month at the rates set forth in Rate Schedule "P-1", a copy of which is attached to this Agreement identified as Exhibit "1", and by this reference made a part hereof. It is understood and agreed that the rates set forth in the said Rate Schedule "P-1" may, *with the confirmation and approval of the Federal Power Commission*, be modified, amended, or superseded, at any time and from time to time, and that if so modified, amended, or superseded, the new rates shall thereupon *become effective and applicable to the sale of Peaking Power Capacity and Peaking Energy under this Article II in accordance with and on*

purchase and sale of other energy amounts and requires that any modification of an existing rate be "in accordance with and on the effective date specified in the final order of the FPC containing such confirmation and approval."

PLAINTIFF'S CONTENTIONS

In its simplest outlines, plaintiff's argument is as follows:

1) The interim rate increase was necessary for compliance with the terms of the Flood Control Act; and,

2) Such an increase is authorized under the contracts extant between the parties, as well as by the terms of the DEOA. The DEOA grants to the Secretary for the Department of Energy the authority to modify and establish power rates for energy generated by federally owned reservoir projects and also authorizes him to establish rate modification on an interim basis.

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the effective date specified in the final order of the Federal Power Commission containing such confirmation and approval." Emphasis added.

(c) Article III, Section 5:

"(b) It is understood and agreed that the rates set forth in the said Rate Schedule "EE" may, *with the confirmation and approval of the Federal Power Commission*, be modified, amended, or superseded, at any time and from time to time, and that if so modified, amended, or superseded, the new rate shall thereupon *become effective and applicable to the sale of Excess Energy under this Article III in accordance with and on the effective date specified in the final order of the Federal Power Commission containing such confirmation and approval."* Emphasis added.

(d) Article IV, Section 3:

"(b) It is understood and agreed that the rates set forth in the said Rate Schedule "IC" may, *with the confirmation and approval of the Federal Power Commission*, be modified, amended, or superseded, at any time, and from time to time, and that if so modified, amended, or superseded, the new rates shall thereupon become effective and applicable to the sale of Interruptible Capacity and energy under this Article IV *in accordance with and on the effective date specified in the final order of the Federal Power Commission containing such confirmation and approval."* Emphasis added.

The underpinning asserted by plaintiff for the last tenet arises from the administrative odyssey which the Flood Control Act has undergone. As stated above, that act originally provided that rates for energy sale become effective upon confirmation and approval by the FPC. When that body was abolished in 1977, its Flood Control Act functions were transferred to the Secretary of Energy. While some FPC functions were transferred to FERC, the authority to confirm and approve rates under Section 5 of the Flood Control Act was not. Rather, that authority went directly to the Secretary of Energy. He is now vested with the authority to both establish and approve rates.

Plaintiff also asserts that interim rate authority is inherent in the Secretary's general rate-making authority. Plaintiff cites *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037 (1942), as evidence of the FPC's analagous authority to impose interim rates under the Natural Gas Act. The Court's decision in that case was based upon its conclusion that the authority to order rate decreases on an interim basis is implicit in the express authority to set rates.

Plaintiff also places much reliance on *Pacific Power & Light Co.* v. *Duncan, et al.*, 499 F.Supp. 672 (D.Or.1980) and *The Montana Power Co., et al.* v. *Edwards, et al.*, Civil Action # 80-842 PA. (D.Or. May 19, 1981). Plaintiff claims that these two cases, arising in the same district court in Oregon, "expressly affirmed the Secretary's interim rate authority". *The Pacific Power & Light Co.* case concluded that the DEOA transferred the Department of the Interior's rate-making authority, as well as the FPC's rate approval functions, to the Department of Energy. Plaintiff contends that this conclusion supports its contention that interim rate authority is inherent in general rate-setting authority. Plaintiff also points to rules of statutory construction for additional support of its "inherency" argument.

Plaintiff candidly describes the financial dilemma facing the Department of Energy, which prompted the imposition of interim rates. FERC's review of any application for a permanent increase will be a lengthy process; one result of any such delay would be the "erosion" of the DOE's power and marketing agencies' financial position. Since "there is no statutory limitation on the Secretary's general rate-making authority", and "the use of interim rates is an essential element of the rate-setting process", the Secretary's present course of action is, plaintiff urges, legal and proper.

Plaintiff also concludes that the imposition of interim rates is permitted by the Tex-La contracts. Since those contracts refer to FPC authority, and since that entity no longer exists and has been effectively replaced by the Department of Energy ("DOE"), the DOE is properly "constructively" substituted for the FPC.

In response to defendant's arguments, discussed *infra*, plaintiff denies that FERC has, by law, assumed the FPC's confirmation function. Plaintiff also disputes defendant's contention that this rate order is the first governmental exercise of the imposition of interim rate authority. It cites to other instances of FPC rate modification on an interim basis, which modifications allegedly established an interim rate procedure. Instead of altering that procedure, Congress provided, by enacting the DEOA, "additional statutory support for the utilization of the interim rates".

In reference to defendant's argument that the increase in question would result in contractual breach, plaintiff reiterates that the DOE is the FPC successor. The fact that FERC possesses final confirmation authority does *not*, plaintiff argues, preclude imposition of interim rates, nor does it "resurrect in FERC the FPC's rate confirmation authority". Plaintiff then disputes defendant's reliance on *Arkansas Power & Light Co., et al.* v. *Schlesinger, et al.*, Civil Action #79-1263 (D.D.C., October 20, 1980), contending that this

case is distinguishable. This distinction arises, plaintiff contends, because the contracts involved in *Arkansas Power* specifically prohibited rate increases relative to a predetermined ceiling. No such prohibition appears in the contracts at issue here.

Plaintiff also emphasizes that the Secretary's order delegating his authority to establish interim rates to the Assistant Secretary for Resource Applications, and delegating authority for final confirmation of those rates to FERC, was proper, since the Secretary is, by statute, empowered to delegate authority as may be necessary to effectuate the purposes of the DEOA. Yet those delegations do not diminish the Secretary's interim rate authority. The authority delegated to FERC did *not* reestablish in FERC the FPC's final confirmation authority.

Plaintiff also cites this Court to the 1981 decision of the District Court for the District of Columbia in *Colorado River Energy Distributors Ass'n, et al.* v. *Lewis, et al.*, 516 F.Supp. 926 (1981). Plaintiff recites the factual similarities extant between that case and this one, and summarizes that Court's conclusions:

> 1) that the Secretary for the DOE has authority to establish interim rates; and,
>
> 2) that the contracts at issue do not preclude the interim rate procedure.

DEFENDANT TEX-LA'S CONTENTIONS

Defendant contends that the fine-line delineations urged by plaintiff as to "interim" versus "final" rate confirmation and approval are untenable. Section 5 of The Flood Control Act speaks merely to "confirmation and approval" before a rate becomes effective. Thus, no rate schedule may be implemented *before* confirmation and approval.

The crux of defendant's attack on plaintiff's position, however, is that, while the Secretary of Energy was empowered to delegate the FPC final confirmation and approval function to the FERC, he was *not* empowered to delegate authority to approve and confirm rates on an interim basis to the Assistant Secretary of Energy for Resource Applications inasmuch as the FPC was not empowered to implement interim rates. Any such delegation would also violate the contracts' specific provisions relative to rate modification.

Defendant reads Section 402 of the DEOA as requiring the participation of FERC in rate confirmation and approval because 1) no "re-delegation" or cancellation of FERC's authority has been made in favor of the Secretary of Energy, and 2) Section 402(e) states that the FERC shall have jurisdiction over matters referred to it pursuant to Section 404. Section 404 requires that the Secretary refer to the FERC any function within the FERC's jurisdiction which may significantly affect that function. Setting rate schedules for wide areas is one such function.

In attacking plaintiff's inherency argument, defendant looks to the language of the Flood Control Act as evidence that no "plenary grant" of rate-making power exists. Rather, it urges that that section specifically negates such a conclusion. The statute also fails to evidence any provision for "interim" (as opposed to final) confirmation and approval. The language of Section 5 of the Flood Control Act is contrasted with various federal and state statutes which either clearly authorize interim rate setting powers *or* contain language sweeping enough to make an inherency argument plausible.

Defendant also attacks plaintiff's proffered contractual construction. The contract's terms do not permit the setting of interim rates, inasmuch as *any* rate modification is subject to FPC "final" approval. Defendant views the *Arkansas Power & Light Co.* decision as standing for the proposition that a contract valid when entered into cannot be modified by the

Government when it becomes politically and/or economically disadvantageous.

Defendant seeks to discredit the *Pacific Power & Light* decision by stating that the Court failed to analyze the Flood Control Act's rate-making function, and failed to distinguish between making a rate final and making it effective; the latter occurs only after confirmation and approval.

Defendant also attacks the plaintiff's characterization of the Secretary's rate-making authority as a single rate-making function. Rather, several such functions exist under the various acts (Natural Gas Act, Federal Power Act, Flood Control Act), and each is to be interpreted according to its own "substantive standard".

While defendant concedes that the two contracts' language was drafted so as to incorporate the requirements of Section 5 of the 1944 Flood Control Act, and that these provisions should be interpreted to reflect statutory amendment, no statutory change has occurred which would make a rate—interim or otherwise—effective without confirmation and approval.

LAW

This Court is not convinced that the terms of the two contracts in question permit a rate increase to become effective prior to confirmation and approval of that rate by either the FERC, pursuant to Delegation Order 0204-33, or by the Secretary of Energy, under the DOE Act, § 301(b).

The language of the two contracts is critical to the above determination. Contract # 864, both in its initial and amended forms, follows Section 5 of the 1944 Flood Control Act, stating that a new rate will become effective "on the date of the order of the Federal Power Commission containing such confirmation and approval". The 1968 amendment of this contract goes even farther, making rate change "subject to the confirmation

and approval of the Federal Power Commission". Contract # 961 also contains, in those provisions relative to rate modification, language tracking the language of Section 5 of the 1944 Flood Control Act—i.e., that modification be "with the confirmation and approval of the Federal Power Commission ... in accordance with and on the date specified in the final order of the Federal Power Commission containing such confirmation and approval". This contractual reference to the necessity of a "final order of the Federal Power Commission" containing approval of the rate modification may not be "read out" by the Department of Energy.

This Court has not been cited to any controlling precedent indicating that interim rate implementation has occurred in past agency action under Section 5 of the Flood Control Act. Interim rate approvals have occurred under the 1938 Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, ("NGA") and the 1935 Federal Power Act, 16 U.S.C. § 793 *et seq.*, ("FPA"), but not under Section 5 of the Flood Control Act. The FPA and the NGA differ from the 1944 Flood Control Act. The FPA and NGA regulate investor-owned companies and thus do not regulate state or federal governmental entities. The Flood Control Act, on the other hand, regulates federal power marketing agencies. These entities are, by function and definition, distinguishable.

It is well settled that consistent past agency practice in interpretation and application of a statute within the sphere of an agency's general function is of significance. *United States* v. *Alabama Great Southern Railroad Co.*, 142 U.S. 615, 12 S.Ct. 306, 35 L.Ed. 1134 (1892); *Environmental Protection Agency* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 101 S.Ct 295, 307, 66 L.Ed.2d 268 (1980); *Udall* v. *Tallman*, 380 U.S. 1, 18, 85 S.Ct. 792, 802, 13 L.Ed.2d 616 (1965). This Court finds guidance in the 30 year practice of the Secretary of the Interior in seeking final confirmation and approval of rates by the FPC before they are made effective. Where the abstention of

agency action in a given area is suddenly abandoned, based on the argument that new authority has been discovered in the original statute, the existence of the newly claimed authority is frequently denied. *National Labor Relations Board* v. *Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267, 289, 94 S.Ct. 1757, 1769, 40 L.Ed.2d 134 (1974); *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513-514, 69 S.Ct. 1251, 1260-1261, 93 L.Ed. 1499 (1949).

The three Section 5 functions referred to above (transmission and disposal, formulation of rate schedules and confirmation and approval) were not altered or enlarged by subsequent statutory amendment. While the enactment in 1977 of the DEOA effected the consolidation of these three rate-making functions in the Secretary of Energy, these functions were not thereby expanded or altered. This transfer, contained in Sections 301(b) and 302 did not extinguish any restraints on the exercise of these functions or enlarge it. The interim rates at issue here have not been confirmed and approved by the Secretary of Energy or by the FERC. Yet it is those agency actions which would be required to constitute final rule making.

The requirements for rule making by the Secretary of Energy appear in Section 501 of the DEOA, 42 U.S.C. § 7191 (Supp. III, 1979). That section, in pertinent part, reads as follows:

> If any provision of any Act, the functions of which are transferred, vested or delegated pursuant to this chapter, provides administrative procedure requirements in addition to the requirements provided in this subchapter, such additional requirements shall also apply to actions under that provision.

42 U.S.C. § 7191(a)(1). Thus, the Secretary is bound in the promulgation of new rules by the procedures set forth in those acts whose functions were transferred to him.

Inasmuch as the Secretary is restrained from making a rate effective prior to its confirmation and approval, his designees

are similarly restrained. The March 1, 1979 DOE order implementing rates against Tex-La on an interim basis may not be construed as a final order, nor did the Secretary's Delegation Order No. 0204-33, 43 Fed. Reg. 60636-37 (1978) create *interim* rate implementation authority. If the Secretary of Energy had acted to confirm and approve the proposed rate, he would have exercised the function transferred to him by the DEOA, Section 301(b). No additional approval and confirmation by FERC would be necessary after such final action by the Secretary. However, an *interim* rate, approved by the Assistant Secretary for Resource Applications must receive final confirmation and approval by FERC. No such final agency rule making action has occurred.

This Court has reviewed the recent district court cases cited to it by movers, and finds persuasive the reasoning of the *Arkansas Power & Light Co.* decision, *supra*. There, as here, the Government entered into a valid commercial contract. It is well settled that it is then bound by the terms of that contract. See *The Sinking Fund Cases*, 99 U.S. 700, 719, 25 L.Ed. 496 (1879) which holds:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much a repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality or a citizen.

Id. at 719.

The exception to this rule will arise when the contract's terms: 1) are in derogation of statutory authority (*Associated Electric Cooperative, Inc.* v. *Morton*, 507 F.2d 1167, n.17 (D.C.Cir.1974)); 2) affect the United States in the exercise of its paramount authority (*Larionoff* v. *United States*, 533 F.2d 1167, 1179 (D.C.Cir.1976)); or, 3) implicate the United States in matters of moral turpitude (*United States* v. *Acme Process Equipment Co.*, 385 U.S. 138, 145, 87 S.Ct. 350, 355, 17 L.Ed.2d 249 (1966)). Another exception would arise should

the contract be invalid when confected. *Cf. Grand River Dam Authority* v. *National Gypsum Co.*, 352 F.2d 130 (10th Cir. 1965). There is no challenge here, however, to the validity of the contracts in issue, nor are the contracts subject to attack under any of the other grounds set forth above.

As stated in the *Arkansas Power & Light Co.* case:

> The dictum in *Associated Electric Cooperative* is not authority for the proposition that the Government can alter or repudiate a contract which was valid at the time it was entered into, but later becomes disadvantageous because of changing economic conditions. Similarly, nothing in the legal history cited to this Court indicates that Congress intended the Flood Control Act to give the Government authority to unilaterally alter existing contracts.

Id. at *slip op.* 4.

The Court also observed at n.3 that the above-quoted language is consistent with the action taken by the FPC in 1957 when the Secretary of the Interior requested approval of a new rate, which rate was not in accordance with a contract's rate schedule. The FPC, stating that it had no authority to determine that rates set in a valid contract are no longer effective, denied the request.

The legislative history of the 1977 DEOA does not indicate that the rate implementation procedure, whether on an interim or other basis, has been altered by transfer of FPC function to the Secretary of Energy. The DEOA Act Conference Report, H.R. Rep. No. 95-539, 95th Cong., 1st Sess. 65 (1977), U.S.Code Cong. & Admin. News, p. 854, states:

> The Conference substitute transfers to the Secretary all functions of the Federal Power Commission, except those transferred to or vested in the Federal Energy Regulatory Commission in Section 402 of the Bill.[8]

[8] Under Section 402(a)(1), Federal Power Commission rate-making functions under the Natural Gas Act and the Federal Power Act were exclusively vested by the Conference Bill in the Federal Energy Regulatory Commission.

This Court has been presented with no precedent for the argument that the FPC's Section 5 rate-making function was a plenary one, imbued with some unarticulated interim rate-making power, nor that the transfer of the FPC function somehow effected such a transformation.

While delegation of final confirmation, and approval authority to the FERC would be appropriate under the DEOA, the Secretary's attempt to delegate interim rate approval and confirmation to the Assistant Secretary of Energy for Resource Applications, pending final confirmation by FERC, is not. Such authority was never included in the FPC function under Section 5 of the Flood Control Act, nor was it contained in the DEOA.

The Court is cognizant of the fact that the Secretary of Energy is empowered by Section 301 to exercise certain administrative powers transferred to the FERC by Section 402(a)(2) of the DEOA, 42 U.S.C. § 7172(a)(2) (Supp. III 1979). These powers are simply administrative powers which exist under the FPA and NGA. Contrary to the decision, however, in *Pacific Power & Light Co.*, *supra*, this Court does not believe that any NGA or FPA administrative powers enable the Secretary of Energy to implement, under Section 301(b) and 402(a)(2) of the DEOA, interim rates under the 1937 Bonneville Project Act ("BPA") 16 U.S.C. § 832 *et seq.*[7] Indeed, it would seem clear that any such power would not be administrative, but is clearly substantive. A mere grant of administrative power relative to a particular act will not create plenary rate making power under a different statute. Interim imposition of rates under both the NGA and FPA, however, is an authorized substantive action. *See* 15 U.S.C. § 717(c) and 16 U.S.C. § 824(d). *See also New England Power Co.* v. *Federal Power Commission*, 467 F.2d 425, 430-31 (D.C.Cir.

[7] The Bonneville Project Act is relevant to the issues here, because the rate schedule implementation provisions of the Flood Control Act were patterned after those in the Bonneville Project Act. Conference, H. R. Rep. No. 2051, 78th Cong., 2d Sess. 7 (1944).

1972); *aff'd*, 415 U.S. 345, 94 S.Ct. 1151, 39 L.Ed.2d 383 (1974). Under Section 5 of the Flood Control Act, however, no substantive statutory foundation exists upon which the Secretary of Energy may implement interim rates.

The plaintiff's argument that the interim imposition of rates is "inherent" in rate making power is unsupported by the language of Section 5 of the Flood Control Act and the DEOA. This Court has reviewed those state and federal court cases cited to it by the parties in which interim implementation of rates was allowed. *See, e.g., Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 150, 83 S.Ct. 211, 214, 9 L.Ed.2d 199 (1962); *Natural Gas Pipeline Co., supra*; *Sellers* v. *Iowa Power & Light Co.*, 372 F. Supp. 1169, 1170-1171 (S.D.Iowa 1974). But the statutes at issue in these cases specifically provided for interim rate implementation.[8] Such a specific grant of interim rate-making power does not support plaintiffs "inherency" argument relative to Section 5 of the Flood Control Act. The Secretary of Energy was given specific rate-making powers pursuant to the 1944 Flood Control Act. The transfer of the rate design and confirmation functions did not work, as the plaintiff suggests, some sort of magic merger whereby the Secretary acquired the authority to impose interim rates. No merger of function occurred, but rather only a merging of the exercises of function.

The parties agree that the contractual provisions at issue here should be interpreted to reflect statutory amendment.

[8] The Iowa statute at issue in *Sellers*, *supra*, reads as follows:

> "However, a public utility *shall have the right at any time after said rates, charges, schedules or regulations have been suspended for ninety days to place in effect* any or all of such suspended rates, charges, schedules or regulations *by filing with the commission a bond* or other undertaking approved by the commission conditioned upon the refund in a manner to be prescribed by the commission of any amounts collected thereunder *in excess of the amounts which would have been collected under rates, charges, schedules, or regulations finally approved by the commission* . . ." Emphasis added.

Iowa Code Ann. § 476.6 (Supp. 1980).

However, there has been no amendment of the rate-making function of Section 5, which function mandates that a rate will become effective only upon confirmation and approval. Nor is "confirmation and approval" of a rate a mere procedural step, as the plaintiff would have this Court find. Rather, "confirmation and approval" is a fundamental function under Section 5 rate making; it constitutes the substantive review whereby a proposed rate is made effective after its design is scrutinized.

Plaintiff relies upon the *Colorado River Energy Distributors* decision, *supra*, in which the Secretary's imposition of an interim rate prior to final approval was upheld. Again, however, this finding was reached relative to statutes which differ from the 1944 Flood Control Act. The statutes at issue there were the Reclamation Act of 1902, 43 U.S.C. § 372 *et seq.*, the Reclamation Project Act of 1939, 43 U.S.C. § 485 *et seq.* and the Colorado River Storage Project Act of 1956, 43 U.S.C. § 620 *et seq.* While all of these statutes, as well as the Flood Control Act, authorize the sale of hydroelectric power generated by federally owned facilities, the similarities stop there.

Section 9(c) of the 1939 Reclamation Project Act, for example, reads in pertinent part:

> Any sale of electrical power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper . . . .

43 U.S.C. § 485h(c)[9]. The Court held that this language created

[9] Section 9(c) in its entirety reads as follows:

"(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, that any such contract either (1) shall require repayment to the United States over a period of years not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3 1/2 per centum per annum, *if the Secretary determines* an interest charge to be proper, of an appropriate share as *determined by the Secretary* of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates *as in the Secretary's judgment* will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges *as the Secretary deems proper*, and shall require the payment of said rates each year in advance of delivery of water for said year. *Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: Provided further*, that in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part of loans made pursuant to the Rural Electrification Act of 1936. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges *shall be in addition and alternative to any authority in existing laws relating to particular projects*. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, *in the judgment of the Secretary*, it will not impair the efficiency of the project for irrigation purposes." 43 U.S.C. § 485h(c) (1976). Emphasis added.

a plenary grant of rate-making power (516 F.Supp. at 930-931). Section 5, however, contains no such broad, sweeping language.

The *Colorado River* decision goes on to state that:

> Finding a general power to collect interim rates does not necessarily mean that such rates may be collected immediately from all customers. The terms on which the Secretary sells CRSP power are governed by a contract.

> The Secretary may not alter its terms unless the alteration is specifically contemplated by the contract or by statute.

At 932.

The contract at issue in that case and those present here are also distinguishable. The *Colorado River* contract reads as follows:

> The rate schedule specified in this contract shall be subject to successive modification by the United States through the promulgation of superseding rate schedules. If at any time the United States promulgates a rate schedule superseding the rate schedule then in effect under this contract, it will promptly notify the contractor thereof. Said superseding rate schedule, as of its effective date, shall become effective unless the contractor ... shall elect to terminate this contract ...

At 932.

But the restraints evident in the contractual provisions at issue here do not permit the result reached in the *Colorado River* decision.[10] The Section 5 confirmation and approval function, incorporated into the contracts at hand, cannot be unilaterally abrogated. While rate increases designed to recover costs arising from changed circumstances must be ultimately recoverable under the terms of Section 5, the increases may only be accomplished in the manner provided by the statute.

The DEOA does *not* create a new plenary rate-making power in the Secretary of Energy under Section 5 of the Flood Control Act, nor does it confirm an existing one. A transfer of existing rate design and implementation authority to the Secretary of Energy did occur; however, the implementation powers transferred are no greater than those which existed prior to the transfer.

Final rate confirmation and approval by the entity exercising that function is mandated by the contracts at issue. Thus,

[10] *See* n.4, 5, *supra*.

these rate proposals are "subject to" final confirmation and approval by the rate-making entity, which confirmation and approval has not occurred. Thus, the Motion for Summary Judgment of defendant Tex-La Cooperative, Inc. is GRANTED, and the Cross Motion of plaintiff United States of America is DENIED.

Judgment shall be entered accordingly.

PETITIONER'S

BRIEF

No. 84-1725

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF FULTON, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Acting Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
ANDREW J. PINCUS
Assistant to the Solicitor General
DAVID M. COHEN
JOHN W. SHOWALTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Secretary of Energy may place into effect on an interim basis an increase in the rate charged for electricity generated by federal hydroelectric projects, subject to final approval of the rate increase by the Federal Energy Regulatory Commission.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the cities of Lamar, Missouri, and Thayer, Missouri, were appellees in the court of appeals and are respondents in this Court. The city of Piggott, Arkansas, reached a settlement with the government in the Claims Court, and accordingly was not an appellee in the court of appeals.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 751 F.2d 1255. The prior opinion of the Court of Claims (Pet. App. 5a-18a) is reported at 680 F.2d 115. The order of the Claims Court (Pet. App. 19a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a) was entered on January 9, 1985. By order dated April 1, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 9, 1985. The petition for a writ of certiorari was filed on May 2, 1985, and was granted on July 1, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Flood Control Act of 1944, the Department of Energy Organization Act, and Department of Energy Delegation Order No. 0204-33 are set forth in the appendix to the petition (Pet. App. 67a-71a).

STATEMENT

1. The federal government operates more than 100 hydroelectric dams on the Nation's waterways. The electricity generated by these projects is sold to the public by five regional power marketing administrations (PMAs): the Southwestern Power Administration, the Southeastern Power Administration, the Bonneville Power Administration, the Western Area Power Administration, and the Alaska Power Administration.[1] The PMAs together provide approximately 6% of the Nation's electric power, serving wholesale customers in 33 states.

This case concerns sales of power by the Southwestern Power Administration (SWPA), which markets electricity produced at dams operated by the Army Corps of Engineers in Arkansas, Missouri, Oklahoma, and Texas. The SWPA's authority to sell electricity rests upon Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, which provides for the sale of electricity generated "at reservoir projects under the control of the Department of the Army and * * * not required in the operation of such projects." See also 10 Fed. Reg. 14527 (1945) (order designating the SWPA as marketing agent for this electricity). Revenues from sales of this power must be sufficient to cover production costs. Thus, Section 5 states that rates "shall be drawn having regard to the recovery * * * of the cost of producing and transmitting" the electricity, "including the amortization of the capital investment allocated to power over a reasonable period of years" (16 U.S.C. 825s).

[1] Power produced at projects located in the Tennessee Valley is marketed by the Tennessee Valley Authority, which differs from the PMAs in that it has sole control over the rates it charges for power (16 U.S.C. 831i, 831m).

Prior to its amendment in 1977, the Flood Control Act authorized the Secretary of the Interior to propose the rates to be charged for electricity, with the rates to "become effective upon confirmation and approval by the Federal Power Commission" (16 U.S.C. (1976 ed.) 825s). The Commission acted upon the Secretary's proposal after providing interested parties with notice and an opportunity to comment and, in some circumstances, an oral hearing. See 18 C.F.R. 2.1(a)(1)(vi)(A) (1976); *United States Department of the Interior, Southwestern Power Administration*, 56 F.P.C. 795, 799 (1976) (public notice and opportunity to comment); *United States Department of the Interior, Bonneville Power Administration*, 58 F.P.C. 2498, 2500 (1977) (formal hearing ordered).

This arrangement for setting the rates for power sold pursuant to the Flood Control Act was altered in 1977 by the Department of Energy Organization Act (DOE Act), 42 U.S.C. 7101 *et seq.* The DOE Act transferred the Secretary of the Interior's rate-proposing function to the Secretary of Energy (42 U.S.C. 7152(a)(1)).[2] In addition, the statute abolished the Federal Power Commission (FPC) and stated that "[e]xcept as provided in subchapter IV of this chapter, there are transferred to, and vested in, the Secretary [of Energy] the function of

[2] The Act also transferred the SWPA and the other PMAs from the Department of the Interior to the Department of Energy and provided that the rate-proposing authority "shall be exercised by the Secretary, acting by and through [the PMA] Administrators" (42 U.S.C. 7152(a)(1) and (2)).

the Federal Power Commission" (42 U.S.C. 7151(b)). Subchapter IV of the DOE Act, which consists of 42 U.S.C. 7171-7177, contains no reference to the Federal Power Commission's authority under the Flood Control Act to approve rates for hydroelectric power generated at federal reservoir projects.

Thus, the DOE Act vests the Secretary of Energy with plenary authority over the rates for electricity sold by the PMAs. As the Fifth Circuit observed in *United States* v. *Tex-La Electric Cooperative, Inc.* (*Tex-La*), "after October 1, 1977, the effective date of the DOE Act, the Secretary of Energy was charged both with developing federal hydroelectric power rates as the Secretary of the Interior used to do, and then with confirming and putting those rates into effect as the Federal Power Commission used to do" (Pet. App. 31a (citations omitted)).[3]

The Secretary of Energy, acting pursuant to Section 642 of the DOE Act, 42 U.S.C. 7252, delegated to the Administrator of the Economic Regulatory Administration within the Department of Energy "the authority * * * to confirm and approve power or transmission rates of federal power marketing agencies" (*Delegation Order No. 0204-4*, para. 15, 42 Fed. Reg. 60726, 60727 (1977)). The Secretary revised this procedure in an order that became effective on January 1, 1979 (*Delegation Order No. 0204-33*, 43 Fed. Reg. 60636 (1978)). He delegated to the Assistant Secretary for Resource Applications, acting through the PMA Administrators, the authority to develop power rates. The Assistant Secretary for Resource Applications also was empowered (*id.* at 60636-60637) "to confirm, approve, and place in effect such rates on an interim basis, for such

[3] The decision in *Tex-La*, which resolved in the government's favor the precise question presented here, is reported at 693 F.2d 392 (5th Cir. 1982), and is reprinted in the appendix to the petition (see Pet. App. 24a-66a).

period or periods as he may provide, subject to refund with interest as determined by the Federal Energy Regulatory Commission." The order delegated to the Federal Energy Regulatory Commission (FERC) the authority to confirm and approve rates on a final basis (*id.* at 60636).[4] Accordingly, under current law the Assistant Secretary may place a rate into effect on an interim basis pending final approval of the rate by the FERC.[5]

2. By the late 1970s, it was apparent that the SWPA, the entity whose rates are at issue here, had failed to satisfy the requirement of the Flood Control Act that rates generate revenues sufficient to recover the cost of producing the electricity. The SWPA did not increase its basic rate between 1957 and 1979 and, as a result of the inflation that occurred during that period, the SWPA consistently incurred a deficit. 44 Fed. Reg. 13068, 13069 (1979); Pet. App. 33a-34a (*Tex-La* decision). The Federal Power Commission observed in 1977 that "SWPA's existing system rates now fail by at least $9,000,000 per year to generate the revenue necessary to repay the costs of producing and transmitting the system projects' power" (*United States Department of the Interior, Southwestern Power Administration*, 58 F.P.C. 2170, 2173 (1977)). See also *United States Department of the Interior, Southwestern Power Administration*, 43 F.P.C. 804, 807 (1970) (after 26 years of operations, the SWPA's revenues had failed to cover

[4] The FERC is a component of the Department of Energy that succeeded to some, but not all, of the Federal Power Commission's rate-making responsibilities. See 42 U.S.C. 7134, 7171-7175.

[5] The most recent delegation order modifies this allocation slightly by authorizing the PMA Administrators to submit rates to the FERC for final approval and by authorizing the Deputy Secretary of Energy to place rates into effect on an interim basis (*Delegation Order No. 0204-108*, 48 Fed. Reg. 55664 (1983)). See also 10 C.F.R. Part 903.

$30 million in interest due on the government's investment in power facilities). The Commission at first refused the SWPA's request for an extension of the existing rates in 1977, finding that they were "not set at a level that recovers the Government's investment in power facilities over a reasonable period of years" (58 F.P.C. at 2173 (footnote omitted)); it agreed to extend the rates only after the SWPA filed a schedule for proposing new rates (*United States Department of the Interior, Southwestern Power Administration*, 59 F.P.C. 2235 (1977)).

Congress also urged the SWPA to increase its rates to cover costs during this period. The House and Senate Appropriations Committees stated in 1978 that they expected the Department of Energy "to move promptly in establishing the new rates for Southwestern Power Administration, and other Administrations as necessary, to recover costs and meet repayment requirements on a current basis" (H.R. Rep. 95-1247, 95th Cong., 2d Sess. 59 (1978); S. Rep. 95-1069, 95th Cong., 2d Sess. 53 (1978)). See also H.R. Rep. 96-243, 96th Cong., 1st Sess. 69 (1979); *Energy and Water Development Appropriations for 1980: Hearings Before the Subcomm. on Energy and Water Development of the House Comm. on Appropriations*, 96th Cong., 1st Sess. 2995-2998 (1979).

In April 1978, the SWPA issued a notice of a proposed rate increase (43 Fed. Reg. 16545-16546). The notice stated that the SWPA had prepared a study of its progress in repaying the government's investment in generation facilities and had concluded "that the legal requirement to repay the power investment with interest is not being met" (*id.* at 16546). The SWPA found that additional revenues of $20 million, an increase of 42% over current revenues, were needed to meet its statutory obligation to cover costs and repay the government's investment. The notice stated that the SWPA had prepared a tentative rate schedule that was

available to interested parties. It solicited written comments and announced that a forum would be held for oral presentations. *Ibid.*[6]

On March 1, 1979, the Assistant Secretary of Energy for Resource Applications issued an order confirming and approving increased power rates for the SWPA and placing the new rates into effect on an interim basis as of April 1, 1979. 44 Fed. Reg. 13068. The Assistant Secretary observed that the SWPA had not increased its general rate since 1957 (*id.* at 13069). He stated that the SWPA had revised its repayment study on the basis of the public comments and concluded that a revenue increase of 33%, as opposed to 42%, was required to meet the statutory repayment obligation. The Assistant Secretary ordered the new rates submitted to the FERC for final approval (*id.* at 13073).[7]

After a second extensive round of public notice and comment, the FERC rendered its decision on the interim rates. The FERC at first disapproved the new rates because they were *too low* (see 46 Fed. Reg. 30877 (1981)). In January 1982, however, after the SWPA submitted additional data, the FERC approved the 33% increase for the period April 1, 1979 through September 30, 1982. 47 Fed. Reg. 4562 (1982); see also 47 Fed. Reg. 16857 (1982) (denying rehearing and confirming approval of rate increase). Thus, the rates finally were approved 33 months after they were placed into effect on an interim basis and proposed to the FERC.

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[6] The SWPA eventually held two meetings to provide information to the public about the rate proposal and two meetings to receive presentations by members of the public. 44 Fed. Reg. 13069 (1979); 43 Fed. Reg. 36514 (1978); 43 Fed. Reg. 25865-25866 (1978).

[7] The Assistant Secretary initially approved the rate increase for 12 months, but subsequently extended the interim increase until the rates were approved by the FERC. See 45 Fed. Reg. 19303 (1980); 46 Fed. Reg. 19849 (1981).

3. Respondents are three cities that purchase power from the SWPA—Fulton, Missouri; Lamar, Missouri; and Thayer, Missouri.[8] Each respondent's contract with the SWPA includes a clause concerning rate changes that essentially incorporates the pertinent language of the Flood Control Act. The clauses provide that new rates may be imposed with the "confirmation and approval of the Federal Power Commission" and that such rates "shall * * * become effective * * * in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval." C.A. App. 93, 127, 157.

Respondents commenced this action in the Court of Claims seeking to recover the money paid pursuant to the interim rate increase between April 1979 and January 1982.[9] Respondents did not challenge the amount of the rate increase; they asserted only that interim rate increases are not permitted under either the Flood Control Act or their contracts with the SWPA. The government contended that the DOE Act authorized the Secretary of Energy to confirm rates under the Flood Control Act, that the decision to place into effect an interim rate was a proper exercise of this authority, and that respondents' contracts permitted the imposition of the interim rate increase.

The Court of Claims granted respondents' motion for summary judgment on the issue of liability (Pet. App. 5a-18a). It rejected the government's argument that the

[8] The city of Piggot, Arkansas, originally was a plaintiff in this action, but its claims were settled in the Claims Court. See *City of Fulton* v. *United States*, No. 509-80 C (Cl. Ct. Apr. 6, 1984).

[9] Respondents invoked the Court of Claims' jurisdiction under 28 U.S.C. (Supp. III 1979) 1491, which provided that the Court of Claims had "jurisdiction to render judgment upon any claim against the United States founded * * * upon any express * * * contract with the United States."

rate-confirming function of the FPC had been transferred to the Secretary of Energy by the DOE Act, observing that "many of the rate approval functions of the FPC were transferred to the FERC in subchapter IV [of the DOE Act], such administrative review to be exercised *independently* of the Secretary of Energy" (Pet. App. 10a (emphasis in original)). The court also noted that the FPC's authority under the Flood Control Act was not listed in another provision of the DOE Act transferring authority to the Secretary (Pet. App. 10a-11a). Finally, the court stated that Section 501(a)(1) of the DOE Act, 42 U.S.C. 7191(a)(1), preserves preexisting administrative procedure requirements and concluded that the requirement of "FPC confirmation and approval * * * [prior to implementation of a rate increase] continues to apply to administrative actions under the Flood Control Act" (Pet. App. 12a).

The Court of Claims also found that "the terms of the contracts clearly contemplate an increase in rate charges only after 'confirmation and approval' by the FPC. No provision for interim increases even exists in the contracts" (Pet. App. 13a). It noted that decisions of this Court prohibit unilateral rate increases in violation of the express terms of utility contracts. *Id.* at 14a & n.15, citing *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The court held that these cases "dictate[ ] that the express contracts between plaintiffs and the SWPA, which contracts provide procedural safeguards prior to initiation of a rate increase, cannot be unilaterally modified by administrative fiat" (Pet. App. 14a).

Finally, the Court of Claims asserted that past administrative practice supported its conclusion that interim rate increases were not authorized under the statute or contracts. It distinguished three interim rate increases

approved by the FPC on the ground that they involved PMAs other than the SWPA (Pet. App. 14a-16a). The court thus concluded that "the rate increase ordered by the Assistant Secretary of Energy on an interim basis violated that provision of the contracts between [respondents] and the Government which required 'confirmation and approval' by the Federal Power Commission" (*id.* at 18a). It remanded the action to its trial division to determine the amount of damages (*ibid.*).

While this case was pending in the trial division of the Court of Claims, that court ceased to exist pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 *et seq.* The newly-created Claims Court assumed jurisdiction over the case. See *id.* § 403(d), 96 Stat. 58. The parties agreed upon the amount of damages, the Claims Court entered a final judgment in the amount of approximately $950,000 (see Pet. App. 19a-21a, 22a), and the United States appealed to the United States Court of Appeals for the Federal Circuit (see 28 U.S.C. 1295(a)(3)).

4. The court of appeals affirmed (Pet. App. 1a-4a). The court rejected respondents' claim that because the Court of Claims previously had issued a decision in the case the court of appeals lacked jurisdiction to review the judgment of the Claims Court (*id.* at 2a). The court of appeals concluded, however, that the prior decision of the Court of Claims regarding the Secretary's rate-setting authority constituted the law of the case (*id.* at 2a-3a).[10] It declined to overrule that decision because it was "convinced the Court of Claims reached the correct result: the interim rate increase was a breach of contract" (*id.* at 3a (footnote omitted)).

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[10] Recognizing that the decision in *City of Fulton* constituted the law of the Federal Circuit (see *Capital Electric Co.* v. *United States*, 729 F.2d 743, 746 (Fed. Cir. 1984)), the government sought an initial en banc hearing in the court of appeals, but that request was denied (Pet. App. 3a-4a).

SUMMARY OF ARGUMENT

A. This case concerns the scope of the Secretary of Energy's authority to set the rates for hydroelectric power generated at certain federal reservoir projects. The Secretary has determined that he may place a rate increase into effect on an interim basis pending final approval of the new rate by the Federal Energy Regulatory Commission (FERC). The Secretary's construction of the statutes he is charged with administering is entitled to "considerable" deference and should be upheld if it is reasonable. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, No. 82-1005 (June 25, 1984), slip op. 5. Here, the plain language of the statutes, the statutes' purposes, and prior administrative practice all mandate the conclusion that the Secretary is authorized to impose interim rates.

The Secretary's rate-setting authority rests upon two statutes. The basic provision, Section 5 of the Flood Control Act of 1944, 16 U.S.C. (1976 ed.) 825s, states that "rate schedules" proposed by the Secretary of the Interior for the sale of hydroelectric power "become effective upon confirmation and approval by the Federal Power Commission." Section 5 thus draws no distinction between interim rate schedules and final rate schedules. Since Congress enacted this provision in order to confer broad authority for the efficient administration of the federal power marketing program, it is most unlikely that Congress intended to limit the types of rates that could be imposed by the Secretary and the Commission. Moreover, a narrow interpretation of the statute would make quite difficult the achievement of Congress's primary goal of establishing an efficient, business-like program not dependent upon government subsidies, because interim rates often are

essential if revenues are to cover the cost of producing the electricity. Finally, the Federal Power Commission's administrative practice of placing interim rate increases into effect under the Flood Control Act and related statutes confirms that Section 5 authorizes the imposition of interim rates.

This rate-setting authority of the Secretary of the Interior and the Federal Power Commission was consolidated in the Secretary of Energy when Congress created the Department of Energy in 1977. The Secretary of Energy therefore succeeded to the interim rate authority conferred by the Flood Control Act. Furthermore, the consolidation of all rate-setting authority in the Secretary of Energy independently supports the conclusion that the Secretary may impose rates on an interim basis. This Court has held that the power to impose interim rates can be implied from plenary rate-setting authority of the type possessed by the Secretary of Energy.

B. The provisions of respondents' purchase contracts relating to rate changes are virtually identical to the portion of the Flood Control Act addressing that subject. The only possible conclusion is that the parties intended to incorporate the statutory language into the contracts so that any lawful rate change automatically would be permissible under the contracts. Even if, as respondents argue, the contracts should be interpreted to guarantee them an opportunity to be heard prior to the imposition of a new rate, the contracts would not prohibit the rate increase at issue here because respondents had a full opportunity to comment upon the interim rate before it became effective. Moreover, respondents had the right to a refund, with interest, if the FERC ultimately rejected the interim rate and approved a lower rate.

Respondents' complaint, at bottom, is that the imposition of an interim rate deprived them of the opportunity to enjoy the old, lower rate while the proposed rate was under review. There is no warrant for interpreting the statutes or the contracts in a manner that permits respondents to benefit from delay in the implementation of a lawful rate increase.

ARGUMENT

THE SECRETARY OF ENERGY MAY PLACE INTO EFFECT AN INTERIM INCREASE IN THE RATE CHARGED FOR ELECTRICITY GENERATED BY FEDERAL HYDROELECTRIC PROJECTS PENDING FINAL CONFIRMATION OF THE NEW RATE BY THE FEDERAL ENERGY REGULATORY COMMISSION

A. The Flood Control Act And The Department Of Energy Organization Act Empower The Secretary To Impose Interim Rate Increases

The Secretary of Energy's authority to set rates for the sale of hydroelectric power produced at federal reservoir projects operated by the Army Corps of Engineers flows from two separate statutes. The Flood Control Act of 1944 provides for the sale of surplus power generated at these projects and authorizes the Secretary of the Interior and the Federal Power Commission to set rates for this power. The Department of Energy Organization Act consolidates this rate-setting authority in the Secretary of Energy.

The Secretary of Energy established a rate-setting process involving several components of the Department of Energy. See *Delegation Order No. 0204-33*, 43 Fed. Reg. 60636 (1978). The PMA Administrators develop the rates for sales of electricity, subject to review by an Assistant Secretary of Energy. If the Assistant Secretary approves the rates, he proposes them to the FERC, which is authorized to confirm rates on a final basis. Most important for purposes of this

case, the Secretary's delegation order provides that the Assistant Secretary may place the rates into effect on an interim basis at the time he proposes the rates to the FERC. Customers' payments pursuant to such interim rates must be refunded with interest if a lower rate subsequently is approved by the FERC. See pages 4-5, *supra*.

The courts below held that the Secretary acted in excess of his statutory authority by delegating interim rate-setting power to the Assistant Secretary. They concluded that the Secretary himself could not place rates into effect prior to confirmation and approval of the rates by the FERC. In our view, these decisions impose a completely unjustified limitation upon the Secretary's broad authority to administer the federal power marketing program. Nothing in the statutes or their legislative histories even remotely indicates that Congress intended to prohibit the Secretary from imposing interim rate increases, and Congress's purposes in enacting both the Flood Control Act and the Department of Energy Organization Act compel the conclusion that interim rate increases are authorized by these statutes. The Secretary's determination that he may place hydroelectric power rates into effect on an interim basis therefore should be upheld by this Court.

1. *The Flood Control Act Of 1944*

a. Section 5 of the Flood Control Act of 1944, 16 U.S.C. (1976 ed.) 825s, authorizes the Secretary of the Interior to "transmit and dispose of" surplus electric power "generated at reservoir projects under the control of the Department of the Army." The statute directs the Secretary of the Interior to act "in such manner as to encourage the most widespread use [of the electricity] at the lowest possible rates to consumers consistent with sound business principles, the rate

schedules to become effective upon confirmation and approval by the Federal Power Commission" (*ibid.*). It specifically requires that rates be set at levels that will recoup the cost of generating the electricity. The terms of the statute and its legislative history clearly demonstrate that Congress conferred upon the Secretary of the Interior and the Commission the power to impose interim rates.

The plain language of Section 5—the starting point in interpreting the statute (*CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980))—authorizes the Secretary of the Interior and the Federal Power Commission to place rates into effect on an interim basis pending final action by the Commission. Although the statute does not separately refer to interim rates, Congress's broad authorization of "rate schedules" encompasses both interim rate schedules and final rate schedules. An interim rate schedule—like a final rate schedule—would "become effective upon" approval by the Commission as provided in Section 5, because both types of rate schedules go into effect following Commission approval. Thus, nothing in the language of Section 5 supports the view that only final rate schedules may be proposed by the Secretary of the Interior and confirmed and approved by the Federal Power Commission.[11] As the Fifth Circuit correctly concluded in *United States* v. *Tex-La Electric Cooperative, Inc. (Tex-La)*, "the Flood Control Act [does not] impose[ ] a requirement that implemented rates be somehow 'final' " (Pet. App. 59a).

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[11] As we discuss below (see pages 20-22), prior to the passage of the Department of Energy Organization Act interim rate schedules were placed into effect under both Section 5 and virtually identical statutes governing the sale of power generated by federal hydroelectric projects in the Pacific Northwest.

The legislative history of the Flood Control Act confirms that Congress's use of broad language in Section 5 was not accidental. The purpose of Section 5 was to grant general authority to market surplus electricity "consistent with sound business principles." The provision therefore cannot be read to impose artificial restrictions on that authority, contrary to normal industry practice, such as by prohibiting the imposition of interim rates.

The passage of the Flood Control Act of 1944 marked a significant change in Congress's approach to the sale of surplus hydroelectric power generated at federal projects operated by the Army Corps of Engineers. Prior to that time, Congress had authorized the sale of such electricity on a project-by-project basis. Section 5, by contrast, grants authority to dispose of surplus power at all such projects. S. Rep. 1030, 78th Cong., 2d Sess. 3 (1944); 90 Cong. Rec. 9281 (1944) (remarks of Rep. Whittington). Secretary of the Interior Ickes suggested that Congress include in the Flood Control Act of 1944 a provision authorizing the sale of surplus electricity generated at federal reservoir projects. He pointed out that such a provision would simplify the government's power marketing activities by applying on a general basis the policies adopted in the earlier statutes. *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce,* 78th Cong., 2d Sess. 461-462 (1944) (statement of Secretary Ickes); see also *Rivers and Harbors Omnibus Bill: Hearings on H.R. 3961 Before a Subcomm. of the Senate Comm. on Commerce,* 78th Cong., 2d Sess. 530, 534, 536 (1944) (statement of Secretary Ickes) (testimony regarding identical provision in related bill); *id.* at 562-565 (statement of Arthur Goldschmidt) (same).

The Senate committee that added Section 5 to the Flood Control Act stated in its report that the provision was intended to establish a "convenient and practical

method of disposing of power" generated by federal projects (S. Rep. 1030, *supra,* at 3). The committee observed that the Director of the Division of Power of the Department of the Interior had stated that "the provisions of [Section 5] contain sufficient authority and latitude for efficient administration" of the hydroelectric power program (*id* . at 3)).[12] This express statement of legislative intent, combined with the fact that Congress knew it was adopting a provision that would govern a large part of the federal hydroelectric power marketing program, precludes a restrictive interpretation of the rate-setting authority set forth in Section 5. Congress plainly intended Section 5 to confer broad authority for the marketing of surplus hydroelectric power, leaving the particulars of the program—including the selection of appropriate rate-setting techniques—to the informed discretion of the Secretary and the Commission.

The conclusion that Congress could not have intended to withhold authority to impose interim rates is strongly supported by the fact that Congress previously had authorized *private* electric utilities to place interim rate increases into effect under certain circumstances. The Federal Power Act provides that a utility may place a rate into effect on an interim basis if the Federal Power Commission (now the Federal Energy Regulatory Commission) suspends the rate and fails to take action concerning the rate within five months (16 U.S.C. 824d(e)).

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[12] The major point of controversy regarding Section 5 was the limitation imposed upon the Secretary's authority to construct power transmission facilities. See *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce,* 78th Cong., 2d Sess. 803-812 (1944). However, the discussion in the committee report is not limited to this issue; it expresses Congress's intent generally to grant broad authority for the administration of the power marketing program.

It seems most unlikely that Congress would have intended to bar a government agency selling electricity from using a rate-setting procedure available to private electric companies. This is especially true because the Flood Control Act requires approval of an interim rate by the Federal Power Commission; under the Federal Power Act a private utility may impose the interim rate unilaterally after the appropriate time period has elapsed.[13]

Moreover, Section 5 must be construed as authorizing the imposition of interim rates because this type of rate increase furthers one of Congress's chief goals in enacting Section 5—ensuring that revenues equal the cost of producing the electricity. Section 5 directs the Secretary to dispose of electricity "at the lowest possible rates to consumers consistent with *sound business principles*" and states that "[r]ate schedules shall be drawn having regard to the recovery * * * of the cost of producing and transmitting such electric energy" (16 U.S.C. (1976 ed.) 825s (emphasis added)). Congress plainly intended rates to be set in a business-like

[13] Respondents argue (Br. in Opp. 15) that the absence of express statutory authorization for the imposition of interim rates under the Flood Control Act should be viewed as dispositive because Congress expressly authorized the use of interim rates in statutes regulating the rates of private utilities. However, it is not surprising that a statute dealing with review of rates set by a government agency would be less specific than a statute regulating the conduct of private parties. It is quite reasonable for Congress to confer greater administrative discretion with regard to federal proprietary activities. Thus, all of the provisions of the Federal Power Act concerning regulation of private utility charges are considerably more complex than the analogous provisions of the Flood Control Act. Compare, *e.g.*, 16 U.S.C. 824 with 16 U.S.C. (1976 ed.) 825s. It is therefore inappropriate to draw any adverse inference from the absence of an express authorization of interim rates.

manner that would ensure the recovery of all relevant costs in order to avoid any need for subsidies from the federal treasury.[14]

Interim rates often are essential in ensuring that a rate increase will result in revenues sufficient to cover costs. When a rate is proposed, the determination that the rate will generate sufficient revenues necessarily rests upon the assumption that the rate will be placed into effect on a specified date. If the regulatory process takes longer than expected, and the scheduled implementation of the rate increase is delayed, the revenues generated by the new rate will be reduced. Interim rates prevent this problem from arising because they permit the implementation of a new rate on schedule, subject to refunds with interest if the rate is later disapproved because it is too high. Congress's goal of a federal hydroelectric program administered in an "efficient" manner so as to fully recover its costs in accordance with "sound business principles" therefore would be quite difficult to achieve if Section 5 were

[14] Section 5 is based upon a virtually identical provision of the Bonneville Project Act of 1937 (see 16 U.S.C. 832e). 90 Cong. Rec. 9281 (1944) (remarks of Rep. Whittington); H.R. Conf. Rep. 2051, 78th Cong., 2d Sess. 7 (1944); S. Rep. 1030, *supra*, at 3. The legislative history of the latter statute reveals that confirmation of rates by the Federal Power Commission was viewed as appropriate at least in part in order to ensure that rates would not be set too low. Thus, one committee report on an earlier version of the statute observed that the Commission's involvement in rate-setting would "eliminate the attempts of private interests to play one Federal project against another in the matter of rates charged for industrial uses, and * * * permit of an orderly and consistent rate policy for the protection and benefit of all the users of surplus electric energy generated at such projects." H.R. Rep. 2955, 74th Cong., 2d Sess. 2 (1936); see also *Columbia River (Bonneville Dam), Oreg. and Wash.: Hearings on H.R. 7642 Before the House Comm. on Rivers and Harbors*, 75th Cong., 1st Sess. 143-144 (1937) (statement of Secretary Ickes).

interpreted to prohibit the utilization of interim rates. In the present case, for example, the SWPA would have lost almost $1 million in revenues from respondents alone if the rates had not been placed into effect on an interim basis.

Finally, the conclusion that Section 5 authorizes interim rates does not conflict with the concern for power customers reflected in Section 5's directive that power should be sold "at the lowest possible rates to consumers consistent with sound business principles."[15] As we have discussed (see pages 18-20, *supra*). interim rates clearly constitute a "sound business principle[ ]." They do not unfairly raise rates because the customer receives a refund, with interest, if a lower final rate is adopted. Thus, interim rates simply prevent the government from losing revenues as a result of delay in the approval of a new rate. Indeed, it is the decisions below that are unfair because they permit purchasers of hydroelectric power such as respondents to reap a financial windfall as a result of regulatory delay.

b. The prior administrative practice under the Flood Control Act and related statutes of placing rates into effect on an interim basis provides still more support for the conclusion that the statute confers interim rate authority. See *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs,* 461 U.S. 624, 635 (1983) (interpretation of statute reflected in consistent agency practice is entitled to deference).

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[15] The legislative history of the provision of the Bonneville Project Act of 1937 that served as the model for Section 5 (see page 19 note 14, *supra*) suggests that the Federal Power Commission's review of proposed rates was designed in part to ensure fairness to consumers. *Columbia River (Bonneville Dam), Oreg. and Wash.: Hearings on H.R. 7642 Before the House Comm. on Rivers and Harbors,* 75th Cong., 1st Sess. 143-144 (1937) (statement of Secretary Ickes); Pet. App. 38a-40a (*Tex-La* decision).

In *United States Department of the Interior, Southeastern Power Administration,* 54 F.P.C. 3, motion to dismiss proceedings denied, 54 F.P.C. 1631 (1975), for example, the FPC reviewed a proposed rate increase pursuant to the Flood Control Act and concluded that a hearing was necessary in order to evaluate the proposed new rate. Nonetheless, it permitted the rate to go into effect immediately, "upon the condition that [the Southeastern Power Administration] agrees to refund or credit to its customers such portions of the proposed rates and charges as may result from Commission disapproval" (54 F.P.C. at 6).[16] The Commission took similar action with respect to two rate increases sought by the Bonneville Power Administration under its essentially identical statutory authority. See *United States Department of the Interior, Bonneville Power Administration,* 58 F.P.C. 2498, 2502 (1977); *United States Department of the Interior, Bonneville Power*

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[16] Respondents (Br. in Opp. 16) and the Court of Claims (Pet. App. 15a-16a) both argue that this example of prior practice is flawed because the Department of the Interior protested the FPC's decision to confirm the rate on an interim basis. However, the Interior Department did not contend that the FPC lacked authority to confirm interim rates; it claimed that the Commission could not take such action in that case because the Commission's authority was restricted to approving or rejecting the rate proposed by the Secretary. See C.A. App. 357, 381-384 (Interior Department filings). The Interior Department's protest therefore does not undermine the conclusion that the Flood Control Act authorized interim rate increases where the Secretary concurred in the Commission's decision to establish an interim rate. Compare *United States Department of the Interior, Bonneville Power Administration,* 58 F.P.C. 2498, 2501 (1977) (Interior Department requested imposition of interim rate). Now that all rate-setting authority is consolidated in the Secretary of Energy, action by the Secretary is all that is required under the statutes to impose interim rates (see pages 22-24, *infra*).

Administration, 52 F.P.C. 1912, 1919 (1974).[17] This uncontradicted administrative interpretation of Section 5 makes clear that the provision authorizes the imposition of interim rates.[18]

In sum, the language, legislative history, and purpose of Section 5, as well as administrative practice under the statute, leave no doubt that the Flood Control Act authorized the Secretary of the Interior and the Federal Power Commission to place power rates into effect on an interim basis pending final approval of the rates by the FPC.

2. *The Department Of Energy Organization Act.*

The Department of Energy Organization Act transferred all Flood Control Act rate-setting authority to the Secretary of Energy, and thus empowers the Secretary to place rates into effect on an interim basis pursuant to that statute. Moreover, the consolidation of plenary rate-setting authority in the Secretary provides an independent basis for upholding the Secretary's determination that he may impose interim rates.

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[17] The Commission specifically rejected the argument that it lacked the authority to confirm the 1977 rate increase on an interim basis. *United States Department of the Interior, Bonneville Power Administration*, 59 F.P.C. 1194 (1977).

[18] Respondents assert (Br. in Opp. 15-16) that these decisions interpreting the Flood Control Act are not entitled to deference because they are inconsistent with decisions confirming rates on a final basis. However, confirmation of rates on an interim basis was not *required* in every case; the statute simply supplied the option of taking such action. Moreover, the Commission's interpretation of the statute is not rendered inconsistent by the fact that it concluded in relatively few situations that the imposition of interim rates was appropriate. As the Fifth Circuit noted in *Tex-La* (Pet. App. 27a-28a), the PMAs did not require frequent rate increases until the high inflation of the mid-1970s, and the FPC therefore would have had little occasion to place rates into effect on an interim basis prior to that time.

a. Congress created the Department of Energy in order to "achieve * * * effective management of energy functions of the Federal Government" (42 U.S.C. 7112(2)). It found that "responsibility for energy policy, regulation, and research, development and demonstration is fragmented in many departments and agencies and thus does not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs" (42 U.S.C. 7111(4)), and concluded that "formulation and implementation of a national energy program require the integration of major Federal energy functions into a single department in the executive branch" (42 U.S.C. 7111(5)). See also H.R. Rep. 95-346, 95th Cong., 1st Sess. Pt. 1, at 2-4, 4-7 (1977); S. Rep. 95-164, 95th Cong., 1st Sess. 1-6 (1977).

The statute creating the new department, the Department of Energy Organization Act (DOE Act), 42 U.S.C. 7101 *et seq.*, applied these principles to the federal power marketing program, consolidating in the Secretary of Energy all authority to set rates for sales of hydroelectric power under the Flood Control Act.[19] Sections 302(a)(1) and (2) of the DOE Act, 42 U.S.C. 7152(a)(1) and (2), transferred to the Secretary of Energy "all functions of the Secretary of the Interior

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[19] At a congressional hearing concerning the proposal to create a Department of Energy, the chairman of the Federal Power Commission pointed to rate-making for sales of federally-generated hydroelectric power as "an example of [an area in which] * * * greater coordination can be achieved." *Department of Energy Organization Act: Hearings on S. 826 and S. 591 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 179 (1977) (statement of Chairman Dunham). Thus, as the *Tex-La* court concluded, "[f]ar from being overlooked or somehow forgotten, the two-stage ratemaking procedure at issue in the present case represented *specifically* the kind of inefficiency and fragmentation of authority that the DOE Act was designed to correct" (Pet. App. 46a (emphasis in original)).

under section 825s of title 16 [Section 5 of the Flood Control Act of 1944]," and provided that this authority "shall be exercised by the Secretary, acting by and through" the administrators of the PMAs.

In addition, the DOE Act abolished the Federal Power Commission and created the Federal Energy Regulatory Commission (42 U.S.C. 7151(b), 7171, 7172). The FERC was vested with specific categories of authority formerly exercised by the FPC (see 42 U.S.C. 7172(a)), and the remainder of the FPC's responsibilities were transferred to the Secretary of Energy (42 U.S.C. 7151(b)). Since the FPC's authority over the rates charged for sales of federal hydroelectric power was not transferred to the FERC, the plain language of the statute makes clear that this authority now resides in the Secretary. As the Fifth Circuit concluded in *Tex-La*, "[t]he inevitable conclusion, and the one that nearly everyone has drawn, is that the Secretary of Energy * * * exercises the confirmation and approval function of the old Federal Power Commission" (Pet. App. 30a).[20]

As we have shown (see pages 13-22, *supra*), prior to 1977 the FPC had authority under the Flood Control Act to approve rates proposed by the Secretary of the Interior on an interim basis. Accordingly, the transfer to the Secretary of Energy of *all* Flood Control Act rate-setting authority in 1977 plainly endowed the Secretary of Energy with the identical power to place interim rates into effect under that statute. The Secretary delegated his interim rate authority to the Assistant Secretary (*Delegation Order No. 0204-33*, 43 Fed. Reg. 60636 (1978)), and the interim rate increases placed into effect pursuant to that delegation of authority therefore are authorized by the Flood Control Act.

[20] The FERC itself has acknowledged that the DOE Act invested the Secretary with sole authority over rates for electricity sold pursuant to the Flood Control Act. See 47 Fed. Reg. 16857, 16858 (1982).

b. This consolidation of authority in the Secretary of Energy did more than transfer the interim rate authority conferred by the Flood Control Act; it supplies an independent basis for concluding that the Secretary may impose interim rate increases. Thus, even if this Court disagrees with our submission that the Flood Control Act authorizes the imposition of interim rates, the Secretary's interim rate authority should be upheld on the basis of his plenary rate-setting authority under the DOE Act.

This Court has concluded in several different contexts that plenary authority over utility rates, such as that possessed by the Secretary here, necessarily includes the power to impose interim rates. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654-656 (1978); *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 150-155 (1962); *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583-585 (1942); *The New England Divisions Case*, 261 U.S. 184 (1923).[21] *Trans Alaska Pipeline Rate Cases, supra*, for example, concerned tariffs filed with the Interstate Commerce Commission by the owners of the Alaska oil pipeline prior to the opening of the

[21] The Court of Claims stated (Pet. App. 11a n.10) that this principle was limited to the Natural Gas Act, but *Trans Alaska Pipeline Rate Cases, supra*, concerns the authority of the Interstate Commerce Commission and therefore makes clear that the rule is a general one. In addition, state statutes endowing a regulatory body with plenary authority over rates consistently have been interpreted to authorize the imposition of interim rates. See, *e.g.*, *Colorado Municipal League* v. *Public Utilities Commission*, 197 Colo. 106, 116-117, 591 P.2d 577, 584 (1979); *In re Kauai Electric Division*, 60 Hawaii 166, 178-181, 590 P.2d 524, 534-535 (1978); *Grindstone Butte Mutual Canal Co.* v. *Idaho Power Co.*, 98 Idaho 860, 864, 574 P.2d 902, 906 (1978); *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 217 Kan. 604, 613-615, 538 P.2d 702, 711 (1975); *Chesapeake & Potomac Telephone Co.* v. *Public Service Commission*, 330 A.2d 236 (D.C. 1974).

pipeline. The Commission exercised its statutory authority to suspend the tariffs because it found that the rates probably were unlawful. In order to enable the pipeline to operate, however, the Commission calculated a reasonable interim rate and stated that it would not suspend a tariff containing that rate, provided that the owners agreed to refund any amount that exceeded the final approved rate. 436 U.S. at 636-637.

This Court upheld the Commission's action, which essentially placed into effect an interim rate set by the Commission. The Court observed that the Commission has "powers 'ancillary' to its [power to suspend rates] which do not depend on an express grant of statutory authority." 436 U.S. at 654. Noting that the Commission is obligated to "strike a proper balance" between the interests of carriers and the interests of the public, the Court held that the Commission's action was a reasonable means of accommodating the public interest and the pipeline owners' need for revenues pending a final determination concerning the proper rate. *Id.* at 654-655; see also *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. at 583-585.

The same reasoning supports the exercise of interim rate authority at issue here. Indeed, this is an *a fortiori* case because the Secretary's authority over rates far exceeds that exercised by the ICC. The Secretary not only approves rates, he proposes them in the first instance. If an agency empowered only to suspend a rate may in effect establish an interim rate when required to do so in the public interest, the Secretary's far broader power must be sufficient to enable him to place interim rates into effect when necessary to satisfy the statutory mandate that revenues meet the cost of producing federally-generated hydroelectricity.

Moreover, as the Fifth Circuit observed in *Tex-La*, a contrary conclusion would produce "a most unlikely result" (Pet. App. 66a). Under the system established by

the DOE Act, the Secretary of Energy could have dispensed completely with any review by the FERC. Therefore, if the Secretary's decision to authorize the Assistant Secretary to impose interim rates is invalidated, it "would have been struck down because it gave litigants *too much* 'process' by giving them one last, truly independent review before the FERC. * * * [W]e think that at the very least it requires searching study and careful consideration before we strike down a scheme that gives the complainants *too much* process" (*ibid.* (emphasis in original)).

c. The Court of Claims nonetheless determined that the Secretary lacks statutory authority to impose rates on an interim basis. This conclusion is largely attributable to the court's view that the DOE Act transferred the FPC's confirmation and approval authority to the FERC, not to the Secretary. This construction of the DOE Act is clearly incorrect.

The linchpin of the Court of Claims' analysis is its statement that "many of the rate approval functions of the FPC were transferred to the FERC" (Pet. App. 10a). As we have discussed (see pages 23-24, *supra*), however, the plain language of the statute makes clear that the FPC's Flood Control Act authority was *not* transferred to the FERC. The Fifth Circuit in *Tex-La* correctly pointed out that the Court of Claims simply "misread[ ] the statute" (Pet. App. 30a). The *Tex-La* court noted that "[a]t a first reading, Title IV of the DOE Act appears to transfer *all* of the hydroelectric power regulating functions of the Federal Power Commission to the new FERC," but that "a closer reading" reveals that the Flood Control Act authority was not transferred to the FERC (*id.* at 29a-30a (emphasis in original)).

The Court of Claims also relied upon Section 501(a)(1) of the DOE Act, 42 U.S.C. 7191(a)(1), which provides that the Act was not intended to abrogate "administra-

tive procedure requirements" imposed by other statutes. The court concluded (Pet. App. 12a) that "FPC confirmation and approval [prior to implementation of a rate increase] * * * constitutes an additional 'administrative procedure requirement' which * * * continues to apply to administrative actions under the Flood Control Act." But this reading of Section 501(a)(1) would prevent the accomplishment of Congress's principal purpose in enacting the DOE Act by mandating the continuation of bifurcated decisionmaking despite Congress's determination to *consolidate* authority in order to eliminate inefficiency. As the *Tex-La* court concluded, "[i]n the eyes of Congress, divisions of authority—here, between the Secretary of the Interior and the Federal Power Commission—were a positive evil, something which the statute was designed to correct. Congress did not, in other words, unite the federal hydroelectric ratemaking authority of the Secretary of the Interior and the Federal Power Commission in the person of the Secretary of Energy by mistake. On the contrary, Congress seems to have done everything within its power to indicate that the unification was accomplished on *purpose*" (Pet. App. 44a (emphasis in original)).

Section 501(a)(1) by its terms relates only to the *procedures* applicable to rulemakings and other types of administrative proceedings. It therefore preserves only "administrative procedure" requirements such as on-the-record hearings and opportunities for cross-examination, and does not apply to substantive matters such as the allocation of authority among agencies. See S. Conf. Rep. 95-367, 95th Cong., 1st Sess. 81 (1977); Pet. App. 47a (*Tex-La* decision) ("Congress intended [Section 501(a)(1)] to apply to the *substance* of the technical procedural requirements, and not to the identity of the agencies responsible for implementing them")

(emphasis in original).[22] Section 501(a)(1) thus cannot be read as an implicit renunciation of Congress's explicit decision to endow the Secretary of Energy with complete authority over the rates for power sold pursuant to the Flood Control Act. See *Escondido Mut. Water Co.* v. *LaJolla Indians*, No. 82-2056 (May 15, 1984), slip op. 10, quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947) ("Congress could not have intended to 'paralyze with one hand what it sought to promote with the other ' ").[23]

d. The Secretary's determination that the Flood Control Act and the DOE Act authorize interim rates is entitled to "considerable" deference because the Secretary is charged with the administration of the hydroelectric power marketing program. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, slip op. 5 (footnote omitted). As long as the Secretary's determination that he is authorized to impose interim rate increases is "based on a permissible construction of the statute[s],"

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[22] It is not clear that Section 501(a)(1) even applies here because the statute preserves only procedural requirements set forth in a "provision of any Act, the functions of which are transferred, vested, or delegated pursuant to [the DOE] Act," and the Flood Control Act does not specify *any* procedural protections. In any event, respondents received all of the procedural protections available in proceedings before the Federal Power Commission. They had opportunities to submit written and oral comments to the SWPA, and the SWPA rates were subject to review by the Assistant Secretary and final review by the FERC. In addition, respondents would have received a refund, with interest, if a lower rate had been approved by the FERC. See pages 6-7, *supra*. The imposition of the interim rate increase therefore could not have violated Section 501(a)(1). See Pet. App. 55a-58a (*Tex-La* decision).

[23] Respondents apparently do not dispute this conclusion; they conceded in the court of appeals that "the final confirmation and approval [of the new rate schedule] could have come from the Secretary himself" (C.A. Br. 24 n.11).

the Secretary's construction of the statutes should be upheld (*ibid.*). See also *id.* at 6-7 & n.14; *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9; *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, No. 82-1071 (June 5, 1984), slip op. 8.

Deference to the Secretary's determination is especially appropriate because the Secretary's delegation order is "'"a contemporaneous construction of [the DOE Act] by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new"'" (*Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (citations omitted)). In view of the plain language and legislative history of both the Flood Control Act and the DOE Act, the Secretary's reasonable interpretation of the statutes should be upheld by this Court.[24]

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[24] The Secretary's interpretation of his authority also is supported by the fact that the 96th Congress—which immediately followed the Congress that enacted the DOE Act—expressly approved the Secretary's authority to place rates into effect on an interim basis. In 1980, Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.*, which provides new ratemaking authority with respect to rates charged by the Bonneville Power Administration. The statute authorizes the FERC to place rates into effect on an interim basis, but it empowers the Secretary of Energy "to approve such interim rates during [a] one-year [transition] period in accordance with the applicable procedures followed by the Secretary prior to [the effective date of this Act]" (16 U.S.C. 839e(i)(6)). Thus, Congress considered and approved the Secretary's determination that he possesses authority to impose interim rates. See 126 Cong. Rec. 29812 (1980) (remarks of Rep. Dingell); *id.* at 27821 (remarks of Rep. Swift). One committee report recognized that "prior to the Department of Energy Organization Act, the Federal Power Commission exercised interim rate approval authority with respect to the Administrator's rates" (S. Rep. 96-272, 96th Cong., 1st Sess. 31 (1979)). In view of the close similarity between the statutes governing the sale of electricity by the Bonneville Power Administration and the Flood Control Act, this legislative history supports the Secretary's interpretation of his authority under the latter statute.

It is, of course, necessary to "take great care * * * before relying on the understandings of Members of a subsequent Congress as to the actions of an earlier one" (*Heckler* v. *Turner*, No. 83-1097 (Feb. 27, 1985), slip op. 24), but here, as in *Turner*, Congress was legislating with respect to an issue close to the very question that is presented in this case. Its statements therefore provide additional support for the Secretary's determination that the Flood Control Act and the DOE Act confer authority to impose interim rate increases. See Pet. App. 60a-62a (*Tex-La* decision).

B. Respondents' Contracts Do Not Immunize Respondents From Interim Rate Increases Authorized By The Relevant Statutes

Respondents' contracts provide that rates may be changed "with the confirmation and approval of the Federal Power Commission" and that a new rate "shall thereupon become effective * * * in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval" (see page 8, *supra*). As the Court of Claims observed (Pet. App. 13a), these provisions incorporate "the very language of the statute * * * into the contract[s'] terms." The contracts accordingly do not insulate respondents from interim rate increases authorized by the Flood Control Act and the DOE Act.

1. The contract terms, like the language of Section 5 that they incorporate, plainly permit the imposition of the interim rate increase at issue here. The order of the Assistant Secretary placing the interim rate increase into effect expressly "confirm[ed] and approve[d]" the new rates (44 Fed. Reg. 13073 (1979)), and therefore satisfied the contracts' requirement that new rates

"shall * * * become effective" after "confirmation and approval." [25] Of course, the contracts refer to "the order of the Federal Power Commission" containing confirmation and approval of the new rate, but the Commission no longer exists and the substitution of the Secretary, the successor to the Commission's authority, cannot seriously be contested. See note 23, *supra*. Any other result would bar *any* change in rates for the duration of the contracts—a result even respondents do not urge.

Moreover, because the contract terms so closely resemble the statutory language concerning rate increases, it is impossible to escape the conclusion that the parties intended simply to incorporate the statutory requirement into the contracts, so that any rate increase permissible under the statute also would be permissible under the contracts. See Pet. App. 60a n.22 (*Tex-La* decision) (contracts were written "to do nothing more than track the language of section 5 of the Flood Control Act"). If the parties had intended to impose additional restrictions upon the government's right to change power rates, it is reasonable to assume that language specifying those restrictions would have been inserted in the contracts.[26]

Respondents (Br. in Opp. 14) and the Court of Claims (Pet. App. 14a) nonetheless assert that the contract provisions bar the Secretary from placing a rate increase into effect unless he follows the procedures previously

[25] The Court of Claims' statement (Pet. App. 16a) that the contracts require "final" approval of a rate increase prior to its implementation is puzzling because the term "final" does not appear in the relevant provisions of the contracts.

[26] Indeed, the purchasers of electricity that were parties in *Tex-La* conceded that their contracts adopted the meaning of the statute (see Pet. App. 49a-50a) even though one of the contracts at issue in that case, unlike respondents' contracts, expressly referred to a "final" order of the FPC confirming and approving a new rate (*id.* at 60a n.22).

used by the Federal Power Commission. Even if this interpretation of the contracts were correct, it would not bar the interim rate increase at issue here because respondents received the benefit of these procedural protections before the interim rate increase became effective. The SWPA solicited comments and held meetings with interested parties prior to submitting its rate request (see pages 6-7, *supra*), and the rate increase was evaluated by the Assistant Secretary before it was placed into effect on an interim basis (44 Fed. Reg. 13068-13073 (1979)).[27] In addition, respondents had a second full opportunity to challenge the rate increase in the FERC proceeding. Thus, in contrast to the procedure prior to the passage of the DOE Act, under which customers could only contest a proposed rate increase before the FPC, respondents had two opportunities to be heard regarding the rate increase at issue here.[28]

Indeed, in view of the requirement that payments pursuant to the interim rate increase be refunded with interest in the event that a lower rate were approved by the FERC, it is difficult to see how respondents have been injured in any manner by the procedure that was followed. All that they have been deprived of is the opportunity to benefit unfairly from regulatory delay attendant to a rate increase. This fact does not justify interpreting the contracts to bar interim rate increases.

2. Despite the contentions of respondents (Br. in Opp. 8-11) and the Court of Claims (Pet. App. 13a-14a), this Court's decisions in *United Gas Pipe Line Co.* v. Mobile

[27] These procedures have been made applicable to all proposals for rate changes under the Flood Control Act (10 C.F.R. Part 903).

[28] Respondents state (Br. in Opp. 14) that the contracts require "complete administrative review prior to the new rates taking effect." However, there is no support for this conclusion in the terms of the contracts and, as we have discussed (see pages 20-22, *supra*), respondents' position is contrary to prior administrative practice.

Gas Service Corp., 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), do not require a different result. In these cases, utilities subject to regulation under the Natural Gas Act and the Federal Power Act entered into contracts to sell power at a fixed rate. This Court held that the utilities were bound by the contract provisions, even if a rate increase was permissible under the standard set forth in the regulatory statute. In a subsequent decision, *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), the Court held that where a contract provides for sales "*not* at a single fixed rate, * * * but at what in effect amounted to [the utility's] 'going' rate," the utility remains free to file new rate schedules pursuant to the statutory scheme (*id.* at 110 (emphasis in original)). The Court stated that "[t]he reason these procedures were unavailable to [the utility] in *Mobile* was because the company had bargained away by contract the right to change its rates unilaterally" (*id.* at 111).

Respondents' contracts plainly reserve to the government the right to change the rates paid by respondents for hydroelectric power. Therefore, even if the rule of *Sierra* and *Mobile* applies to contracts for the sale of power under the Flood Control Act, it plainly does not prohibit the rate increase at issue here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
ANDREW J. PINCUS
Assistant to the Solicitor General
DAVID M. COHEN
JOHN W. SHOWALTER
Attorneys

SEPTEMBER 1985

RESPONDENT'S

BRIEF

No. 84-1725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

CITY OF FULTON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF RESPONDENTS

CHARLES F. WHEATLEY, JR.
(*Counsel of Record*)
WHEATLEY & WOLLESEN
1112 Watergate Office Bldg.
2600 Virginia Avenue, N.W.
Washington, D.C. 20037-1971
(202) 337-5543

October 23, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the United States, having entered into contracts for the sale of hydroelectric power to three small cities at designated rates which could be changed only "with the confirmation and approval of the Federal Power Commission", the new rate to "thereupon become effective . . . on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval," was precluded from seeking, through the Secretary of Energy, to unilaterally change the effective contract rates on an interim basis while the rates remained subject to confirmation and approval.

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BRIEF OF RESPONDENTS

The Cities of Fulton, Lamar and Thayer, Missouri, respectfully urge that the Court affirm the decision below of the United States Court of Appeals for the Federal Circuit in this matter.

STATUTORY PROVISIONS INVOLVED

Sections 641 and 705(a) of the Department of Energy Organization Act, 42 U.S.C. §§ 7251, 729(a), which Sections were not previously set forth in the Government's Petition or Brief, are set forth in the Statutory Appendix to this Brief.

STATEMENT OF THE CASE

On April 29, 1977, the Cities of Fulton and Lamar, Missouri (with Thayer, Missouri, collectively, "Cities") entered renewal contracts[1] with the United States for the purchase of hydroelectric power from certain federal dams located in Missouri and Arkansas under the power marketing jurisdiction of the Southwestern Power Administration ("SWPA"). The contracts contained a specific Rate Schedule (F-1) and provided as follows:

> It is understood and agreed that the rates and/or terms and conditions set forth in the said Rate Schedule 'F-1', with the confirmation and approval of the Federal Power Commission, may be increased, decreased, modified, superceded, or supplemented, at any time, and from time to time, and that if so increased, decreased, modified, superceded, or supplemented, the *new rates* and/or terms and conditions *shall thereupon become effective* and applicable to the purchase and sale of Firm Power and Firm Energy under this Contract in accordance with and *on the effective dates specified in the order of the Federal Power Commission containing such confirmation and approval.*

(Emphasis added.)

The language of the contract between the United States and the City of Thayer, signed on April 15, 1963, was virtually identical.[2] Each of the contracts with the Cities further specifically noted, "WHEREAS under Section 5 of the Flood Control Act of 1944 . . . the Secretary of the Interior is

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[1] The original contracts entered on October 19, 1956 and March 3, 1952, respectively, for Fulton and Lamar, contained virtually identical language relating to how the specified rates could be changed.

[2] A fourth city, Piggott, Arkansas, was a party plaintiff to the Court of Claims suit. After that court entered a favorable decision on liabiliy for the four cities, a final dollar settlement was reached between the Government and Piggott.

authorized to . . . dispose of electric power and energy . . . *at rates confirmed and approved by the Federal Power Commission . . .*" (Emphasis added.) (Portions of the contracts relevant to Cities' claims were appended to Cities' Brief Opposing Certiorari.)

SWPA was designated by the Secretary of the Interior[3] to authorize the entry of contracts by the United States with the Cities under Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, which provided as follows:

> Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules *to become effective upon confirmation and approval by the Federal Power Commission . . .*

(Emphasis added.)

After the enactment of Section 5 of the Flood Control Act of 1944, the Government's consistent administrative practice was to not put any new rate proposed by the Secretary of Interior into effect prior to confirmation and approval by the FPC.

After the above-described contracts had been entered with the Cities, Congress in 1977 enacted the Department of Energy Organization Act (DOE Act), 42 U.S.C. §§ 7101 *et seq.* That Act did not purport to make any substantive amendment to Section 5 of the Flood Control Act of 1944, but transferred both the functions of the Federal Power Commission (FPC) and the Secretary of Interior thereunder to the Secretary of Energy. In 1978, the Secretary

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[3] 10 Fed. Reg. 14527 (1945).

the Government's claim that the DOE Act authorized the interim rate increase and noted that § 501 of the DOE Act compelled the Secretary to comply with procedural requirements which applied to administrative actions under the Flood Control Act. Gov't Pet. at 10-12a. The case was remanded pursuant to the Court of Claims order of May 19, 1982 to determine the amount of recovery.

The Government applied for an extension of time in which to file a petition for a writ of certiorari to this court from this final judgment on liability by the Court of Claims. On November 4, 1982, the Government announced that it would not file a petition for a writ of certiorari at that time but would seek to reserve that right to a later date. On October 1, 1982, the Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25 (1982), became effective whereunder the Court of Claims ceased to exist and its trial functions were assumed by the newly-created Claims Court. Under the Act, the Claims Court obtained jurisdiction over the issue of the amount of recovery. The Government then entered a stipulation with the three Cities as to the amount of recovery at approximately $950,000 (*see* Gov't Pet. at 19a-22a) for the locked-in period prior to the final FERC approval. The newly-created Claims Court entered judgment on that stipulation for the Cities. The Government then appealed to the new United States Court of Appeals for the Federal Circuit in which it sought to attack the earlier final judgment on liability entered by the Court of Claims.

The Court of Appeals for the Federal Circuit, in a per curiam decision, noted that the government "seeks to relitigate the identical issue that [the Court of Claims] decision resolved against it." Gov't Pet. at 1a. The Federal Circuit Court of Appeals confirmed the Court of Claims' decision both on the basis that it was the law of the case and because the court was "convinced the Court of Claims reached the correct result: the interim rate increase was a

of Energy issued an order which delegated to the Federal Energy Regulatory Commission (FERC) (the successor to the FPC) the authority to confirm and approve rates on a final basis, which authority had originally been conferred upon the FPC.[4] By the same delegation order, the Secretary purported to confer authority on the Assistant Secretary for Resource Applications to order into effect rates as to which review was pending at the FERC. The Assistant Secretary exercised that authority on March 9, 1979, raising SWPA's rates to Cities on an interim basis. Rate Order No. SWPA-1, 44 Fed. Reg. 13068 (March 9, 1979). The Cities filed suit in the Court of Claims for breach of their contracts based on the collection by SWPA of interim rates prior to the final "confirmation and approval" of those rates by the FERC.

The Court of Claims issued a final judgment of liability in the Cities' behalf on May 19, 1982 for breach of contract. The Court of Claims concluded that the Government's interim rate increase was a breach of contract. The court found that the terms of the contracts clearly contemplated an increase in rates only after confirmation and approval. *See* Government Petition for Certiorari, at 13a. The court also relied on the *Mobile-Sierra*[5] doctrine, noting that Cities' contracts, which provide procedural safeguards prior to initiation of a rate increase, cannot be unilaterally modified by administrative fiat. Gov't Pet. at 14a. The court's conclusion that the contracts were breached was aided by its failure to discover a single instance in the period 1944-77 in which the FPC, pursuant to the Flood Control Act, approved on an *interim* basis a rate increase sought by SWPA (Gov't Pet. at 16a). The court rejected

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[4] Delegation Order No. 0204-33, 43 Fed. Reg. 60636 (1978).

[5] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

breach of contract." Gov't Pet. at 3a. Rejecting the Government's argument based on the decision of the Fifth Circuit in *United States* v. *Tex-La Electric Cooperative*, 693 F.2d 392 (5th Cir. 1982) ("*Tex-La*") that transfer of both the rate formulation and rate approval functions to the Secretary of Energy created interim rate authority, the Court of Appeals stated

> . . . we rely in particular on the reasoning of the district court in *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.* No. H-80-1781 (S.D. Tex. Aug. 13, 1982) *vacated and judgment for plaintiff entered*, No. H-80-1781 (S.D. Tex. April 25, 1983) (*pursuant to United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F.2d 392 (5th Cir. 1982)), *aff'd*, 712 F.2d 1414 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 997 (1984).

Gov't Pet. at 3a.

In the *Sam Rayburn* memorandum opinion (reprinted in the Brief *amicus curiae* of Sam Rayburn Dam Co-op in opposition to certiorari, pp. A-1 to A-34), the district court reasoned 1) that the clear language of the Flood Control Act demonstrated congressional intent that there be no interim rate increases before FPC confirmation and approval (Sam Rayburn Brief, at A-17, A-18); 2) that the DOE Act transferred both the Secretary of the Interior's rate formulation functions and the FPC's confirmation functions to the Secretary of Energy (Sam Rayburn Brief at A-5, A-6); 3) that those transferred functions were not changed, enlarged or altered, given the ordinary meaning of the verb "transfer" (Sam Rayburn Brief at A-6) and 4) that support for the "transferred but not changed" conclusion is found in the DOE Act in Section 501, 42 U.S.C. § 7191, which preserves prior procedural requirements, and in Section 641, 42 U.S.C .§ 7251, which qualifies the Secretary's transferred authority to that available by law to the agency from which such function was transferred (Sam Rayburn Brief at A-7 to A-9).

The Government's suggestion for an initial hearing by the full Court of Appeals for the Federal Circuit en banc was denied, "since no member of this panel or any judge on the court requested a polling on a hearing en banc." Gov't Pet. at 4a. This Court granted certiorari on July 1, 1985.

In the earlier litigation initiated by the Government leading to the *Tex-La* decision, the Government conceded that its power to issue an interim rate did not arise under Section 5 of the Flood Control Act of 1944, but solely from the alleged changes in that Act by the enactment of the DOE Act in 1977. The district court in *Sam Rayburn* found:

> Plaintiff [United States] in the present case recognizes that prior to the enactment of the DOE Act, the rates developed by the Secretary of the Interior did not become effective until they were confirmed and approved by the FPC. (Plaintiff's Memorandum at 6, May 12, 1981). But plaintiff contends that the relevant transfer provisions of the DOE Act somehow altered that procedure, that the DOE Act eliminated the original bifurcated process when it vested both rate establishment and approval authority in the Secretary of Energy . . .

Sam Rayburn Cert. Brief at A-6.

Similarly, in *Tex-La*, the Fifth Circuit concluded that in the 1944 Flood Control Act "Congress unmistakably intended that the Federal Power Commission apply its ratemaking expertise partly to protect consumers from undue rate increases instituted by local power administrators" (Gov't Pet. at 40a) and then turned to "[t]he next and more important question [of] what, if any, changes the 1977 Congress intended to make in the bifurcated scheme of the . . . 1944 Act . . ." *Id.* The attempt by the Government before the present Court to argue that the 1944 Flood Control Act "authorizes the Secretary of the Interior and the Federal Power Commission to place rates into effect on

an interim basis pending final action by the Commission" (Gov't Brief at 15) represents a substantial new departure from its prior position in the earlier litigation.

Another new matter argued by the Government in this Court is the in terrorem argument that the 1944 Act and 1977 Act must be construed to permit interim rates because "[b]y the late 1970s, it was apparent that the SWPA . . . had failed to satisfy the requirement of the Flood Control Act that rates generate revenues sufficient to recover the cost of producing the electricity." Gov't Brief at 5. There is no record in the present case, and the matter was never litigated below, as to the validity of that contention.[6] No such finding was made by any of the courts, including the *Tex-La* court, which considered the matter. Furthermore, the Government's assertion is at odds with the fact that the final rates as approved by the FERC in this case are required to meet the repayment tests; no appeal was taken by the Government from the FERC order. Thus, the rates approved by FERC must be presumed to be adequate to cover all future repayment obligations for the federal projects as of the time they went into effect. Any inference that it was necessary to put increases into effect earlier than the final approval by the FERC to assure project repayment also runs counter to the conclusion that "Congress [in the 1944 Act] unmistakably intended that the Federal Power Commission apply its ratemaking expertise

[6] The Government's attempt to rely in this Court on non-record factual assertions never presented in the hearings below where they could be met by the Cities in a trial, is also exemplified by its claim in its petition for a writ of certiorari that "more than $500 million might be subject to refund if the Claims Court and the Federal Circuit continue to adhere to the rationale of this case." Gov't Pet. at 21. This claim has been abandoned by the Government in its brief on the merits, after the Cities specifically requested discovery of evidence. See letters dated July 5, 1985 and July 12, 1985 attached hereto as Appendix A.

partly to protect consumers from undue rate increases instituted by the local power administrators." *Tex-La.* Gov't Pet. at 40a.[7]

Indeed, the protection of consumers recognized in the mandate of § 5 of the Flood Control Act that the rates shall "encourage the most widespread use [of electric power] at the lowest possible rates to consumers", 16 U.S.C. § 825s, fits closely with the mandate of that Act against interim rates. Imposition of interim rates, even those subject to refund, carries a great potential for injury to the ultimate consumers of the electricity—in this case, the residents of the Cities. The harm increases with the length of the interim period, as it becomes more likely that particular consumers will be denied subsequent refunds, and more likely that the seller of power will "pancake" successive interim increases, forcing the buyer into a perennial game of catch-up. Allowing for interim rates greatly extends the period between imposition of the rate and the ultimate opportunity to seek judicial review respecting the increase. Worst of all, it is conceivable that allowance of interim rates directly contributes to regulatory delay, by removing whatever incentive the concerned agencies may have to act expeditiously. No less relevant, the Cities also face fiscal responsibilities, which may be seriously strained by an interim rate increase. When faced with such, the Cities' representatives are faced with the dilemma of either passing the uncertain charges on to their residents, with the consequent ill effects previously mentioned; or alternatively, attempting to cover the increases to the detriment of other essential services. In sum, Cities did not bring this suit "to reap a financial windfall as a result of regu-

[7] The fact that proposed increases as high as 42% were deemed excessive and reduced to 33% (Gov't Brief at 7) reflects the wisdom of the 1944 Act's clear language, embodied in the Cities' contracts, precluding any increase in the rates prior to the effective date of confirmation and approval by the Commission.

latory delay." Gov't Brief at 20. Rather, Cities filed their petition in 1980, during the pendency of the interim rates, to redress an injurious breach of contract.

SUMMARY OF THE ARGUMENT

1. Both the Court of Claims and the Federal Circuit Court of Appeals reviewed Cities' contracts and determined that they had been breached by the Government's interim rate increase. This Court must now determine whether the findings by those two courts were proper. Evidence of the contracting parties' intent—the language of the contracts, the parties' course of dealings and the administrative context relevant to these contractual power sales—allows for only one conclusion: that interim rates may not be imposed.

The plain language of these contracts ties the effective date of any rate increase to the order which confirms and approves the rate. A rate is not "approved" while it remains expressly subject to the approval of some reviewing body.

Precedents from the *Mobile-Sierra* doctrine aid in the interpretation of these rate-changing terms and further the conclusion that contract terms tying rate effectiveness to an approval order preclude rate imposition prior to approval. Under the *Mobile-Sierra* doctrine, the parties by contract can agree as to whether their rates can be put into effect on an interim basis or whether final approval is required by the regulatory agency. Those cases arose under the express language of the Federal Power Act of 1935, 16 U.S.C. § 791 *et seq.*, and the companion Natural Gas Act of 1938, 15 U.S.C. § 717 *et seq.*, administered by the Federal Power Commission. Those acts, unlike the Flood Control Act of 1944, expressly authorize interim rate implementation and mandate a procedure for refunds to consumers.

The Court in the *Mobile-Sierra* cases held however that the terms of the contracts between the parties nevertheless governed whether interim rates were to be allowed. Thus, regardless of the interpretation of statutory language, the contracts similarly control between these parties.

Intent to bar interim rate imposition is further borne out by the course of dealing established between these parties, in which rates imposed pending review were never employed. In fact, no SWPA rate was ever, prior to this case, allowed to take effect on an interim basis. The language of the contracts, confirmed by the course of dealings thereunder barring interim rates, was also clearly consistent with the meaning of § 5 of the 1944 Flood Control Act. The Government conceded as much in the *Sam Rayburn* case.

The contracts involved in this case were executed prior to the enactment of the DOE Act in 1977. Since the 1977 DOE Act can have no effect on the Cities' prior contracts, the court below can be affirmed without reaching the issue addressed in *Tex-La* as to whether the 1977 DOE Act amended the rate setting scheme provided for in the earlier Flood Control Act.

Further, the DOE Act could not have amended Cities' contracts because that Act contained a savings provision which bound the government to comply with all previously existing contracts according to their terms. Nor did the SWPA ever contact the Cities to attempt a modification of the contracts.

2. If the issue of the new construction that the Government now seeks to place on § 5 of the Flood Control Act of 1944 (disavowed in *Tex-La*), as well as the issue as to whether the DOE Act of 1977 amended the substantive rate-setting provisions of the 1944 Act (so held in *Tex-La*, but expressly rejected by the Federal Circuit and the Court

of Claims below), must be reached in this case (as stated previously, the issue needn't be reached because Cities' contracts bar interim rates regardless), neither statute authorizes the interim rates employed in this case.

The language of § 5 of the Flood Control Act allows rates to become effective only upon confirmation and approval of the rates as the lowest possible rates consistent with sound business practice. Confirmation and approval plainly cannot be granted while the rates are still subject to confirmation and approval. Section 5 also has no express grants of authority from which interim rate authority might be inferred.

Had Congress intended to provide for interim rates, it could have adopted express language allowing such rates, as found in the earlier-enacted Federal Power Act and Natural Gas Act. The omission of such provisions makes it clear, as the Federal Circuit and Court of Claims both ruled that there was no authorization for interim rates under § 5 of the 1944 Act.

Review of the legislative history of § 5 offers nothing to contradict the plain terms of § 5, but demonstrates rather that 1) Congress' general purpose in enacting § 5 was to broadly distribute to consumers the benefits of low cost power generated by flood control projects; 2) the FPC's authority was intentionally limited to a veto power over rates; and 3) the FPC's limited authority was nonetheless final authority—the rates could not be imposed until after the FPC's function was complete. In light of these findings, the Court should not interpret § 5 to injure, via interim rates, the consumers the legislation was designed to benefit; and the Court should not broadly interpret the authority formerly held by the FPC.

That interim rates are unavailable under the Flood Control Act is also shown by thirty years of consistent administrative practice in which rates were never ordered

effective while review of that rate was pending. The Government's sole instance of interim ratemaking under the Flood Control Act is unpersuasive; that action was protested by the Department of Interior itself as *ultra vires*.

The DOE Act's transfer of § 5 rate functions to the Secretary of Energy did not give the Secretary interim rate authority. A contrary interpretation would violate the congressional intent that no new authority be created by the DOE Act. The DOE Act also expressly preserved the power marketing authorities as autonomous entities, negating any interpretation that the Secretary was to have plenary or undivided rate authority. In addition, § 501 of the DOE Act obliged the Secretary to honor the requirements associated with the § 5 rate procedures; he was therefore required to exhaust all delegated review functions before imposing the rate. Finally, the Government's argument lacks persuasive support. The *Tex-La* case it principally relies upon engages in disfavored judicial legislation.

ARGUMENT

I. The Courts Below Correctly Concluded That The Interim Rate Increase Was Barred By The Government's Contracts With The Cities

In this case, both the United States Court of Appeals for the Federal Circuit* and a three-judge panel of the former Court of Claims of the United States have reviewed the facts presented and independently concluded that the Secretary of Energy's imposition of an interim rate increase was a breach of the Government's contracts with the Cities. As this is a breach of contract case, the primary inquiry relevant to this Court's review of the case is the inquiry into

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*The Government's petition for consideration and rehearing en banc was denied as well. Gov't Pet. at 4a.

whether the Government's conduct violated the terms of the contract. That inquiry will ultimately resolve itself on a determination of the meaning of the terms of this contract; and that determination rests, in the final analysis, upon the parties' intent at the time these contracts were entered into. If, as both courts below found, the parties intended to make no provision for the imposition of interim rates, then the Government's charging of new rates while those rates remained subject to administrative approval was a breach of contract.

The purpose of the above elementary recital is to clarify the central issue presented by the case—an issue the Government in its various briefs and pleadings has endeavored to confuse. The enactment of the Department of Energy Organization Act (DOE Act) *after* these contracts were entered into could not amend the intent the parties had at the time the contracts were executed.[9] Nor did enactment of the DOE Act in 1977 modify the government's obligations under then-effective contracts. The legislation carried a savings clause which obliged the new executive department to honor its inherited contracts according to their terms. So even assuming, *arguendo*, that the DOE Act gave the Secretary of Energy authority to impose interim rates, the Secretary could not do so as to Cities if such would violate the terms of their contracts.

Cities shall now demonstrate that interim rates were *not* within the intention of the parties to these contracts, as that intention is revealed by the written agreements, subsequent course of performance and prior course of dealing.

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[9] Indeed, if, as the court below held, the contracts barred interim rates, the meaning of the DOE Act (as well as that of the 1944 Act) is moot and need not be reached. The meaning of the statutes must be decided only if the contracts are not controlling on the Government.

A. The Express Language Of The Contracts, The Course Of Dealings Between The Parties, And The Administrative Context All Support The Conclusion That The Parties Intended That No Interim Rates Be Imposed

The Southwestern Power Administration's contract with the City of Fulton, dated April 29, 1977, provides at Article II, Section 6, in pertinent part:

> It is understood and agreed that the rates and/or terms and conditions set forth in the said Rate Schedule 'F-1', with the confirmation and approval of the Federal Power Commission, may be increased, decreased, modified, superseded, or supplemented, at any time, and from time to time, and that if so increased, decreased, modified, superseded, or supplemented, the new rates and/or terms and conditions shall thereupon become effective and applicable to the purchase and sale of Firm Power and Firm Energy under this Contract in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval.[10]

As a general rule, the United States is as much bound by its contract as are individuals. *Union Pacific Railroad Co.* v. *U.S.* (Sinking Fund Cases), 99 U.S. 700 (1878). Normally, contracts between the United States and others are construed as contracts between private parties. *S.R.A. Inc.* v. *Minnesota*, 327 U.S. 558, 564 (1946). Paramount among the normal rules of contract construction is that the intention of the parties must control, such intention to be gathered from the words used according to their conventional meaning. *Trimble* v. *Seattle*, 231 U.S. 683, 688 (1914); *United States* v. *Choctaw Nation*, 179 U.S. 494, 531 (1900). But if such words are ambiguous, then resort may be had to such evidence as will disclose the circumstances attending the execution of the instrument and so place the Court in the

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[10] The contracts for Lamar and Thayer, dated, respectively, April 29, 1977 and April 15, 1963, are virtually identical.

situation in which the parties stood when they signed the writing to be interpreted. *Id.* In addition, even where the language is not ambiguous, Article II of the Uniform Commercial Code, covering contracts for the sale of goods, provides the modern rule that contractual intent may be discerned, and construction of written terms may be explained or supplemented, by reference to the parties' course of performance during an executory contract, and by the course of dealing previously established between the parties, insofar as those are consistent with the express terms."[11]

1. Interim Rates Are Barred By The Express Terms Of The Contracts

Here, the contracts provide that rates may be changed with the confirmation and approval of the FPC, the new rate to "thereupon become effective . . . in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval." As the word "thereupon" in that context must mean "following" or "immediately after," the rate-setting term as written would be ordinarily understood to mean that the new rate could not become effective until after the required confirmation and approval were complete. This is tantamount to saying that rates which remain subject to required administrative analysis, rates which therefore can only be collected expressly subject to refund, that is, interim rates, may not be charged to the customer.

In addition, if, as was the case with the rate increase involved here, the new rate has been made expressly subject to approval by some body, then, pending that approval, the new rate is not yet an "approved" rate, as that term is ordinarily understood, no matter what label the Assistant Secretary of Energy chooses to put on his earlier order.

Construing the language of these contracts, the Court of Claims recognized that these terms are very similar to the

[11] Uniform Commercial Code, § 2-208 (1972).

terms of contracts that provide certain procedural protections from unilateral rate changes under the Supreme Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*") *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*"); and *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958) ("*Memphis*").

The concurrently decided *Mobile* and *Sierra* cases established the proposition that parties subject to regulation under the Federal Power Act and the Natural Gas Act are free initially to establish relations between themselves by private contract. *Mobile*, 350 U.S. at 339. If the contract makes no allowance for a change in the rates, neither party may resort to the statutory procedures to unilaterally effect a change in the contract rate. 350 U.S. 339-340. There has been no suggestion in the present case that the SWPA and the Cities lacked the freedom to establish relations between themselves by contract.[12] Precedents under the *Mobile-Sierra* doctrine are therefore very useful guidelines for the interpretation of the contract language here, respecting rate-setting procedures in a power supply agreement.

In *City of Kaukauna* v. *FERC*, 581 F.2d 993, 996 (D.C. Cir. 1978), the language being construed allowed new rates "as are ultimately *made effective* through such proceedings and review." 581 F.2d at 996 (emphasis added). This language was interpreted to mean that new rates may become effective only upon *the conclusion* of a proceeding by the Federal Power Commission. The same reasoning applies to the SWPA-Cities language that establishes the rate changing procedure that requires new rate schedules to

[12] The SWPA was authorized to enter into supply contracts with customers such as the Cities by the 1945 order which designated SWPA as the marketing agent for the electricity from specified flood control projects. *See* 10 Fed. Reg. 14527 (1945).

become effective upon confirmation and approval by the Commission—the body required to approve the rates.

Contract language similar to the language before the courts below—linking the effective date to the order of approval—was reviewed by the Fifth Circuit in *Louisiana Power & Light* v. *FERC*, 587 F.2d 671 (5th Cir. 1979), where the contract provided for a change in rate only by order issued by a regulatory authority.[18] *Id.* at 674. The court interpreted this language as barring any change in the rates prior to a final order by the Commission on the merits of the increase.[19]

The *Louisiana Power & Light* court based its decision on two reasons. First, if the parties had in fact agreed to allow a change in rates under section 205 of the Federal Power Act, with its interim ratemaking authority, the contracts should have stated as much in unambiguous terms. 587 F.2d at 676, *citing Public Service Company of New Mexico* v. *FPC*, 557 F.2d 227, 232 (10th Cir. 1977). The second reason was that, under the *Mobile-Sierra* doctrine, the contract establishes the manner in which rates may be changed. Therefore, if interim ratemaking authority was intended to apply, then the manner of change would be left to the Company, not the Commission, and this was clearly not what the parties intended. The interpretation of the SWPA-Cities contracts should follow the reasoning of the *Louisiana Power & Light* court.[19]

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[18] The contract language interpreted in *Louisiana Power & Light* stated as follows:

> The terms and conditions of this Agreement and Rate Schedule are subject to amendment or alteration *as a result of and in accordance with a valid applicable order of any governmental authority having jurisdiction hereof.*

[19] 587 F.2d at 676.

[19] *See also, Richmond Power & Light* v. *FPC*, 481 F.2d 490, 497 (D.C. Cir. 1973), *cert. denied sub nom., Indiana & Michigan Electric Co.* v. *FPC*, 414 U.S. 1068 (1973).

The SWPA is no stranger to the *Mobile-Sierra* doctrine and should understand the implications of the language inserted into its contracts. In *Sam Rayburn Dam Electric Cooperative* v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975), the SWPA, Gulf States Utilities Company, and a cooperatively-owned customer contracted, with the encouragement of the Administrator of SWPA, for the sale and transmission of SWPA power to the cooperative, under language which required regulatory approval.[20] The court held that the parties intended to "reflect, first, an acknowledgement that even an agreed-upon rate increase would necessarily be subject to the final approval of the appropriate regulatory agency, and second, an understanding that such an increase could not become effective *until* the agency so ordered." 515 F.2d at 1003 (emphasis in original).

Finally, the SWPA itself was enjoined from collecting higher rates under Rate Order No. SWPA-1 because they violated the terms of a contract. In *Arkansas Power & Light Co.* v. *Schlesinger*; Civ Action No. 79-1263 (D.D.C. October 20, 1980), *appeal dismissed*, No. 80-2573 (D.C. Cir. Jan. 26, 1981), (reprinted in the Court of Appeals Appendix at pp. 17-22), the court relied on the contract to prohibit collection of increased rates. That contract also provided that any change in the rates would go into effect upon the confirmation and approval of the FPC.

Not only is the contract language plain in its exclusion of interim rates, but the language was selected by the

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[20] The clause stated in pertinent part:

> This contract shall not become effective unless and until the rates, compensation, and terms and conditions, provided in both this contract and in the SPA-Sam Dam Co-op Contract are confirmed and approved by such state or federal regulatory bodies having jurisdiction and required by law to accept, confirm, and/or approve such rates, compensation, and terms and conditions . . . .

515 F.2d at 1003, n. 23.

Government which did not use express language authorizing interim rates. In this situation, the Court should opt for the interpretation barring interim rates as the construction least favorable to the party which selected the contractual language—in this case, the government. *United States* v. *Seckinger*, 397 U.S. 203, 216 (1970). The Court's observation in *The Mosross* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959), applies with equal force to the current case:

> . . . we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have.

359 U.S. at 183.

If the Government had desired, at the time the contract was conceived, to make provision for imposition of interim rates, then it should have inserted clear language to that effect into the terms it drafted. The Government may not now seek the Court's assistance in re-writing the contract to conform it to the Government's current desires.

2. The Dealings Between The Parties And The Administrative Context In Which The Contracts Were Executed Provide Consistent Support For The Construction Which Precludes Interim Rates

The Cities of Fulton and Lamar entered into the contracts at issue with SWPA on April 29, 1977, continuing contractual power supply relationships governed by similar clauses dating from, respectively, 1956 and 1962. The City of Thayer entered into its contract with SWPA on April 15, 1963.

Insofar as the course of performance of these contracts and the course of dealings between these parties are relevant to a construction of the rate-setting terms, both establish that interim rates are not a part of these contracts because interim rates have never been used between these parties or pursuant to these contracts. The sole exception

is the interim rate increase at issue here, which was collected only under protest from Cities.

When the "F-1" rate schedule was devised in 1957, it was not allowed to take effect until after the FPC's order of confirmation and approval, which approved the rate for a stated *prospective* period. *United States Department of the Interior, Southwestern Power Administration*, 18 F.P.C. 153, 157 (1957). In the twenty years that followed, Cities paid no rate to SWPA which had not been *previously* reviewed and approved by the FPC. *See, e.g., United States Department of the Interior, Southwestern Power Administration*, 32 F.P.C. 562, 563 (1964); 38 F.P.C. 753 (1967); 51 F.P.C. 1740, 1741, 1745 (1974).

Reference to the practice by SWPA exclusive of the Cities provides additional evidence that interim rate authority could not have been within the contemplation of the parties when these contracts were entered into. No SWPA rate was allowed to take effect while it was subject to administrative review or before issuance of the order finally confirming and approving the rate. *See, e.g., In re United States Department of the Interior; Southwestern Power Administration*, 30 F.P.C. 1608, 1610 (1963) (aluminum contract rate redetermination); 42 F.P.C. 662 (1969) (extension of *existing* rates for prospective periods to allow review of newly-filed increases for Whitney Project rates); 45 F.P.C. 394, 397 (1971) (Sam Rayburn Dam Project rate increase); 45 F.P.C. 183, 185 (1971) (Narrows Dam Project rate increase); 56 F.P.C. 795, 803 (1976) (Narrows Dam Project rate increase). *See also, Associated Electric Cooperative, Inc.* v. *Morton*, 507 F.2d 1167 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 830 (1975), in which the court noted that the contract language between SWPA and the Cooperative provided that "rates may be increased or decreased by S[W]PA, subject to approval of the FPC." 507 F.2d at 1172. The SWPA submitted the rates to the FPC in January 1970, and awaited FPC review, which was

completed on May 28, 1970, before collecting the rates in July 1970. *Id.* at 1173.

Further evidence from the administrative context suggests that the parties anticipated that no interim rate or rates subject to refund could be charged or collected. This evidence is found in the Flood Control Act itself. As will be explained further below in part II.A, pp. 26-29, *infra*, § 5 of the Flood Control Act expressly confers limited authority to the FPC in its rate review provisions and expressly provide that a change in rates is to be effective only upon confirmation and approval by the Commission. The FPC is empowered only to confirm and approve, or reject and remand, the rates presented to it for review. The FPC was not empowered by the Act to revise the rates submitted to it and, as revised, put them into effect. Nor does the Flood Control Act have any express provisions enabling the government to collect rates subject to refund. Some type of refund mechanism is necessary whenever interim rates will be imposed; that is, whenever rates that are still undergoing review are charged, they can only be collected subject to refund.

In 1975, when the FPC unexplainedly sought to approve rates for a different power marketing group, the Southeastern Power Administration, on an interim basis, this action brought a sharp protest from the Interior Department on grounds that the FPC lacked any such authority under the Flood Control Act. *See* Court of Appeals Appendix at 357. This protest demonstrates, *inter alia*, the consistent view held by the Secretary of the Interior, who was responsible for the negotiation of the contracts in this case, that the Flood Control Act confers no interim ratemaking powers.

A final consideration respecting the intent of the parties to these contracts regards the nature of interim rates. The Government has suggested that it is a matter of indifference to the purchaser of electricity whether it pays only

the approved rate or pays an interim rate with a later refund of the excess over the approved rate. This argument is refuted by the long line of cases under the *Sierra-Mobile* doctrine (*supra*, pp. 17-20) holding that parties are entitled to enforce contractual protections against interim rates. The Cities, and their residents, are well aware that the difference is one of consequence and a right worth preserving in their contracts. A contract prohibition against collection of rates until finally approved is a substantial property right, entitled to protection. *Cf. City of Chanute, et al.* v. *Kansas Gas & Electric Co.*, 564 F.Supp. 1416 (D.Kan. 1983), *aff'd* 754 F.2d 310 (10th Cir. 1985) (court issued preliminary injunction to safeguard municipalities' contract rights with the SWPA). The Government's attempts to equate that right to a "refund" protection would in effect reverse the dollar judgment awarded the Cities by the Claims Court below. Similarly, the results of all of the *Sierra-Mobile* cases would be reversed on such a theory. Further, this Court has long recognized the limited benefit of refunds. *See FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-55 (1962). The longer the interim period, the greater the potential harm, as customers are deprived of the use of their money, denied early judicial review of the merits of the increase and quite possibly denied any eventual refund because they are no longer available to receive the refund.

B. The Department Of Energy Organization Act, By Express Provision, Did Not Alter The Terms Of The Contracts Or The Government's Obligations Thereunder

Having established that there could have been no intent by the parties to these contracts to allow for interim rates, it remains only to show that the contracts themselves were not subsequently changed so as to allow imposition of rates that were subject to review. Simply put, the DOE Act obliged the Department of Energy to honor, according to their terms, the contracts which it inherited from other

agencies of the government. Section 705(a) of that Act, 42 U.S.C. § 7295, provides in part:

> (a) *All* orders, determinations, rules, regulations, permits, *contracts*, certificates, licenses, and privileges—
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> (1) *which have been issued, made, granted, or allowed to become effective* thereof in the performance of functions which are transferred under this Act to the Department or the Commission after the date of enactment of this Act, and
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> (2) *which are in effect at the time this Act takes effect, shall continue in effect according to their terms* until modified, terminated, superceded, set aside, or revoked in accordance with law by the President, the Secretary, the Federal Energy Regulatory Commission, or other authorized officials, a court of competent jurisdiction, or by operation of law.

(Emphasis added.)

This savings clause prohibits any attempt to penalize government contractors like the Cities for relying in good faith on their agreements with the government.

As for the qualifying clause, if the savings provision is to have any meaning, that qualification should simply be interpreted to mean that such contracts, rules, regulations, etc. must be honored until they expire[17] or are changed pursuant to whatever procedure would ordinarily be used to terminate the Government's commitments or obligations thereunder without regard to the DOE Act.

In sum, interim rate increases were not allowed under the terms of the Cities' contracts at the time the DOE Act took effect on October 1, 1977; the Department of Energy was expressly bound by the terms of those contracts,[18]

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[17] The Cities' contracts expire in 1987.

[18] The controlling rule is that a subsequent party is under a duty to investigate the intended meaning of the contract and is bound to the interpretation established between the contracting parties. *Perry and Wallis, Inc.* v. *U.S.*, 427 F.2d 722, 725 (Ct. Cl. 1970).

and the imposition of interim rates before review was completed and while subject to refund violated the terms of the contracts and constituted a breach.

II. The Interim Rate Increase Exceeded The Government's Authority Under The Flood Control Act Of 1944 And The DOE Act Of 1977

The Government has argued that the DOE Act, through its reorganization and consolidation of governmental functions, gave the Secretary of Energy authority to impose rates on an interim basis. As has been shown, the DOE Act *could not* alter *ex post facto* the intent of parties to contracts formed previously. As was further shown, the DOE Act expressly did not alter the government's commitment to the terms of these contracts. So even if it were assumed that the DOE Act altered the authority conferred by the Flood Control Act, the interim rates imposed on Cities would nonetheless be impermissible as a breach of the contracts. On the other hand, if the DOE Act did not alter the Flood Control Act, and that latter Act made no allowance for interim rates, then the Assistant Secretary's interim rate order was impermissible for an entirely separate reason, i.e., because it was *ultra vires*.

Cities shall not now demonstrate by reference to the plain language of the Flood Control Act, its history, and practice pursuant thereto that Section 5 of that Act does not allow rates which are yet subject to confirmation and approval to be imposed on customers. Cities shall further show that Congress clearly intended, and clearly expressed its intention, that the Secretary of Energy would have no greater authority with respect to functions transferred by the DOE Act than that authority possessed by the agencies

previously responsible for those functions. Put simply, Congress intended, with passage of the DOE Act, to leave the Flood Control Act's requirements and limitations on authority intact.

A. The Language Of The Flood Control Act, The Limited Power It Confers, Its Legislative History And Administrative Practice Pursuant To The Act All Confirm That No Interim Rate-Setting Authority Was Created By That Act

The Flood Control Act of 1944 does not confer discretionary authority to place rates into effect on an interim basis. Section 5 reads, in pertinent part:

> Electric power and energy generated at reservoir projects . . . shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, *the rate schedules to become effective upon confirmation and approval by the Federal Power Commission.* Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years . . .

Act of December 12, 1944, § 5, 58 Stat. 890 (emphasis added).

In determining the scope of Section 5 of the Flood Control Act, as with any other statute, "one is to look first at its language." *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983). The language of Section 5 plainly excludes the imposition of rates before they have been reviewed to confirm their compliance with the other rate directives of

Section 5. By specific provision, SWPA rate schedules only become *effective*, that is, actually in operation or in force,[28] *upon*, that is, at the time of or immediately after[29] *confirmation and approval.* In the context of Section 5, confirmation and approval of the rate require a statement to the effect that particular rates or charges are "the lowest possible consistent with sound business principles" and have been "drawn having regard to the recovery of the costs of producing and transmitting (the) electric energy." If the government has not yet made up its mind as to whether a particular rate complies with that statutory mandate, then the rate simply can't be charged, consistent with Section 5.

The Government's interpretation of this straightforward language is illogical; at best, that interpretation would reduce the required "confirmation and approval" to the status of an incantation. The Assistant Secretary of the Department of Energy could not logically "confirm and approve" the rate, thereby declaring that it is the lowest possible rate consonant with sound business practices, and in the same breath forward the schedule to another body for the undeniable purpose of investigating that rate's accordance with the mandate that it be the lowest possible rate consistent with sound business practices. That is precisely what the Government attempted to do with this rate increase. *See Rate Order No. SWPA-1*, 44 Fed. Reg. 13068 (March 9, 1979). The Government's argument that the statutory term "rate schedules" encompasses both "interim rate schedules" and "final rate schedules" (Gov't Brief at 15) best highlights this illogic. The FPC could never have "confirmed and approved" a rate schedule *while* it was reviewing that same rate schedule to determine whether it was appropriate to "confirm and approve" the

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[28] Random House College Dictionary, Rev. ed. at 421.

[29] *Id.* at 1444.

rate. Nothing inherent in a rate schedule distinguishes whether it is "interim" or "final"; the question is solely one of when the charges contained therein are allowed to be imposed on customers. Pursuant to Section 5 of the Flood Control Act, a rate increase cannot become effective until *after* the proposal is confirmed and approved as the lowest possible rate consistent with sound business principles.

In addition, the language of Section 5 of the Flood Control Act clearly differs from language that Congress repeatedly used to confer interim ratemaking authority. Since at least 1935, with the passage of the Federal Power Act, Congress has shown itself capable of drafting language which expressly grants the power to put rates into effect, typically after a suspension period, prior to the completion of administrative review.[21] These statutes, in almost every instance, also confer authority on the relevant agencies to order an accounting and refund of interim rates collected in excess of the rate as finally approved. Section 5 of the Flood Control Act not only lacks any express "file-and-suspend" procedures; that section is also devoid of any type of refund mechanism, provisions which this Court has termed "necessary and directly related means of discharging the [agency's] other mandate to protect the public

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[21] *See* Natural Gas Act, § 4(e), 15 U.S.C. § 717c(e) ("If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural gas company making the filing, the proposed change of rate . . . shall go into effect . . ."). *See also,* Federal Power Act, § 205(e), 16 U.S.C. § 824d(e); Federal Communications Act, § 204, 47 U.S.C. § 204; Interstate Commerce Act, Part I, § 15(7), 49 U.S.C. § 15(7); Motor Carrier Act, §§ 216(g), 218(c) (repealed 1978); Water Carrier Act, Part III, §§ 307(g), 307(i) (repealed 1978); Freight Forwarders Act, Part III, § 406(e) (repealed 1978); Federal Aviation Act, title X, § 1002(g) (amended 1977), 49 U.S.C. § 1482(g) (current version).

pending a more complete determination of the reasonableness . . . of the rates." *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 655 (1978). Thus, Section 5 grants neither express interim authority nor any type of authority, such as file-and-suspend, accounting or refund authority, from which one might conceivably infer interim rate authority. One may safely conclude, therefore, that Congress meant what it said when it enacted Section 5: rates for federally marketed power may be collected from consumers only *after* the FPC (or its successor) has determined that the rate complies with the statutory requirements. When the Assistant Secretary forwards the rate schedules to the government agency best situated to evaluate the costs of supplying electricity,[22] it defies belief to accept that the statutorily required determination has yet been made. Therefore, the plain language of the Flood Control Act prohibited the rate's becoming effective while it was still before the FERC.[23]

The legislative history of Section 5 of the Flood Control Act reveals nothing which would derogate in any manner the express command that the rate not become effective until after the FPC's confirmation and approval function was complete. Review of the legislative history does reveal, on the other hand, that 1) Congress was concerned with ensuring that federally-generated benefits would go to as

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[22] That is, the FERC.

[23] Because imposition of interim rates is logically *excluded* by the plain terms of § 5, the Government's arguments that those terms should be read broadly are unavailing. Even viewed on its own terms, however, the argument is unconvincing. The comparison to "normal industry practice" (Gov't Brief at 16) is a misleading reference to the interim rate authority *expressly* granted by § 205 of the Federal Power Act, 16 U.S.C. § 824d. Again, if Congress had desired to arrange for some other type of rate procedure than the kind it did settle upon, it could easily have adopted the interim rate language contained in earlier statutes.

many consumers as possible; 2) the authority granted the FPC was very limited authority; and 3) that limited confirmation and approval authority was nonetheless final authority, not "interim" authority, and not merely pro forma or rubber stamp approval.

Review of Congress' consideration of § 5 demonstrates first and foremost that the Government's arguments emphasizing recoupment of federal power supply costs (Gov't Brief at 18-20) put the cart before the horse. Section 5 and similar enactments represent a legislative response to the "problem" of distributing the benefits associated with federal river projects. The quite apparent focus of these enactments is upon the widest possible dissemination of those federal benefits. Specifically, the goal of Section 5 was to ensure that the cost savings associated with federally generated hydroelectric power inure to the benefit of the ultimate consumers of that power. Section 5 certainly provides that the government should be reimbursed for its expenditures related to the generation and transmission of electricity, but this is principally a function of rate design.[34] In keeping with the principle that all federally-held property is held in trust for the citizenry, this legislation was devised to achieve broad distribution of benefits to consumers. Section 5 should not now be interpreted to damage the very consumer interests which the legislation was specifically designed to benefit.

The legislative history supports the clear language. Section 5 of the Flood Control Act of 1944 was added to that Act by a Senate Committee at the urging of Secretary of the Interior Harold L. Ickes. The thrust of the bill, H.R. 4485, was continued commitment to a national flood program. The individual project plans contemplated "the most

[34] Section 5 provides: rates *shall be drawn* having regard to the recovery of the costs of producing and transmitting [the] electric energy, 16 U.S.C. § 825s (emphasis supplied).

practicable and economical method of providing flood control and, where practicable, of conserving the flood water for beneficial uses." H.R. Rep. No. 1309, 78th Cong. 2d Sess. 5 (1944). The projects were planned, in each case, "with a view to producing the greatest good to the greatest number of people." *Id.*

Speaking before a subcommittee of the Senate Committee on Commerce, Secretary Ickes offered the language which became Section 5 as an amendment to a related bill to correct what the Secretary perceived as "a definite abandonment of the principles adopted by previous Congress' intent upon the public interest." The Secretary continued, "A reversal of the present policies of assuring the wide distribution of the benefits of low-cost federal power that has been established would be unfair to the areas in which these dams will be built." *River and Harbors Omnibus Bill; Hearings on H.R. 3961 Before a Subcommittee of the Senate Committee on Commerce,* 78th Cong. 2d Sess. 535 (1944). The Secretary concluded in his prepared statement, "In order to insure that the benefits of the electric energy produced at projects authorized by the pending bill will inure to the ultimate consumers, I believe that provisions for the marketing of such energy in accordance with the procedures laid down in . . . existing laws should be added to the bill." *Id.* at 530. *See also Flood Control: Hearings on H.R. 4485 Before a Subcommittee of the Senate Committee on Commerce,* 78th Cong. 2nd Sess. 461-462 (1944) (Statement of Secretary Ickes, offering same amendment to flood control bill.)

The Senate's consideration of H.R. 4485, as amended with Secretary Ickes' proposal, evolved into a protracted debate and referendum on the consumer benefit provisions, particularly the clause granting preference in sale to public bodies and cooperatives. Following three days of debate on this subject, the Senate rejected the "Bailey Amendment" which would have contradicted the preference clause and

mandated sale by the government at the point of generation. *See* 90 Cong. Rec. 9369 (1944). Ultimately the Senate accepted the Committee language which adopted Secretary Ickes' proposal. 90 Cong. Rec. 8383 (1944). The amendment was recommended by the Conference Committee[25] and met little opposition when the bill returned to the House. With regards to § 5, Congressman Rankin commented, "I wish to congratulate the conferees, and also the Senate, on the great step forward in protecting the power consumers in the use of the electricity generated at the projects provided for under this bill." 90 Cong. Rec. 9283 (1944).

In light of the overwhelming evidence of congressional intent to benefit the consuming public, this Court should avoid any interpretation of Section 5 which injures the individual ratepayers. The Court has long recognized that imposition of interim rates is injurious to the ultimate consumer:

> True, the exaction would have been subject to refund, but experience has shown this to be somewhat illusory in view of the trickling down process necessary to be followed, the incidental cost of which is often borne by the consumer, and in view of the transient nature of our society which often prevents refunds from reaching those to whom they are due.

FPC v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-55 (1962). The plain language and the clear purpose of Section 5 should not be now perverted to allow the imposition of interim rates on Cities' residents and the other consumers of the electricity marketed under the Flood Control Act.

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[25] The Conference Committee Report itself offers little to illuminate the precise issue before the Court, not mentioning FPC confirmation and approval. *See* H.R. Rep. No. 2051, 78th Cong. 2d Sess. 7 (1944) (Conference Report).

The Bonneville Project Act of 1937, 50 Stat. 731 (1937) (current version at 16 U.S.C. § 832 *et seq.*), exemplifies the principles and "procedures laid down in existing law" mentioned by Secretary Ickes as the pattern for the amendment which became Section 5. *Hearings on H.R. 3961* at 530. As with the Flood Control Act, the relevant rate language in the Bonneville Project Act was again proposed by Secretary Ickes, as the recommendation of the President's National Power Policy Committee, which Ickes chaired. *See Columbia River (Bonneville Dam), Oreg. and Wash.: Hearings on H.R. 7642 Before the House Comm. on Rivers and Harbors,* 75th Cong. 1st Sess. 141 (1937). With respect to the proposed rate procedures, the Secretary explained the Federal Power Commission's involvement as follows:

> . . . it would be desirable that the Administrator's allocation of costs between the various purposes of navigation, flood control, irrigation, and power which might be served by a multiple-purpose project like Bonneville or Grand Coulee, the estimates of operating costs, and the policies to be pursued to develop the widest possible markets, might appropriately be checked and audited by a national agency in the light of national policy. The primary responsibility for the development of rate schedules adaptable to regional circumstances should be the Administrator's, but certain advantages might be obtained by having the rate schedules, after they are prepared by the Administrator, approved by a national agency as being in conformity with national policy.

Id. at 144.

This proposed role for the FPC drew a protest from the Commission. In a letter to Rivers and Harbors Committee Chairman Joseph Mansfield, FPC Vice Chairman Clyde Seavey objected to the limitation of the Commission's authority to a veto power, stating the FPC's recommendation "that it either be relieved from any responsibility in connection with rates charged, or that its control over rates

be made adequate, effective, and complete . . ." *Hearings on H.R. 7642,* Appendix D, at 499-500. Although language enlarging the FPC's authority was for a time incorporated into the bill,[26] that formulation was ultimately passed over in favor of the procedures as originally proposed by Secretary Ickes.[27]

Thus, Congress specifically rejected an opportunity to confer on the Federal Power Commission extensive (or "plenary", as the Government would have it) authority with respect to federal power rates. The legislature decided instead to assign to the Commission only the limited confirmation and approval function which was reiterated in Section 5 of the Flood Control Act.

Although limited, the confirmation and approval responsibilities delegated to the FPC were not to be meaningless. Thus, it was anticipated that the local administrator's allocation of costs and estimates of costs would be checked and audited in the light of national policy. A major element of that national policy, as we have seen, was protection of consumers from excessive rates. *Hearings on H.R. 7642* at 144. *See also, Tex-La* (Gov't Pet. at 38a).[28] The necessary audit would be best performed by an agency with expertise in evaluating electricity rates. *Hearings on H.R. 7642* at 150. Most importantly, that review authority would be final authority. Responding directly to the objection to the bill

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[26] See H.R. Rep. No. 1090, 75th Cong. 1st Sess. 3 (1937).

[27] See H.R. Rep. No. 1507, 75th Cong., 1st Sess. 5 (1937) (Conference Report).

[28] The Fifth Circuit in *Tex-La* concluded that the legislative history of the 1944 Act established:

> that Congress unmistakably intended that the Federal Power Commission apply its ratemaking expertise partly to protect consumers from undue rate increases instituted by the local power administrators.

voiced at the FPC, Secretary Ickes made the following remarks in a colloquy with Congressman Culkin:

> MR. CULKIN. They [the FPC] would pass on the rates finally?
>
> SECRETARY ICKES. Yes.
>
> MR. CULKIN. Not in the beginning.
>
> SECRETARY ICKES. I think it would be in the interest of economy and efficiency if the local administrator fixes rates, passes them up for review and for acceptance or rejection by the Power Commission.
>
> MR. CULKIN. And, of course, as I understand it, they view that with alarm, according to the press; they think that they should have the sole power of fixing the rates; they think that it is a divided authority and would be the parent of confusion.
>
> SECRETARY ICKES. Well, if I have a final decision on a question, I do not think there is any divided authority, regardless of how the question comes up to me. The man who has the final "yes" or "no"—he is the final authority.

Id. at 150. Thus, the FPC's confirmation and approval were designed to finalize the rates. If the rate schedules may only become effective following confirmation and approval,[29] then the conclusion is inescapable that rates may not become effective until they are final. Put simply, no interim rates may be imposed.

After its review of the legislative history of the Food Control Act and Bonneville Project Act, the court in *United States* v. *Tex-La Electric Cooperative, Inc.,* 693 F.2d 392 (5th Cir. 1982), pronounced Secretary Ickes' congressional testimony

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[29] This is the only reasonable construction of the language "to become effective upon", as the Government has conceded. Gov't Brief at 15.

> more than simply probative. As chairman of President Roosevelt's National Power Policy Committee, Secretary Ickes was responsible for drafting what became Section 6 [of the Bonneville Project Act]; as Secretary of the Interior he was also ultimately responsible for carrying its provisions into effect through his designee, the Bonneville Project Administrator . . .

Gov't Pet. at 39a-40a. For the same reasons, the Secretary's explanations are worthy of equal deference by this Court. *See Bowsher* v. *Merck & Co.*, 460 U.S. 824, 832 (1983) (amendment's sponsor's explanations are authoritative). If Secretary Ickes' explanations are credited, then the legislative history clearly complements the plain language of Section 5, requiring final confirmation and approval before the rates may take effect.

Not surprisingly, thirty years of practice pursuant to Section 5 of the Flood Control Act demonstrates consistent adherence to the requirement of Section 5 that the rate be confirmed and approved as consistent with statutory standards before the rate could take effect.[30] *See, e.g., Southwestern Power Administration*, 6 F.P.C. 408, 409 (1947) (SWPA developmental phase general rate); *United States Department of the Interior*, 8 F.P.C. 638, 640 (1949) (Altoona project rates); *United States Department of the Interior, Southwestern Power Administration*, 13 F.P.C. 1632, 1633 (1954) (Whitney Project rates); *United States Department of the Interior, Southeastern Power Administration*, 16 F.P.C. 848, 850 (1956) (Kerr Project rates); *United*

[30] In some instances, the FPC confirmed and approved what it termed "interim rates." These were rates reviewed, approved and declared effective for a short period, to allow time for review of *another*, typically more detailed or comprehensive rate. These "interims" were *not* rates imposed on customers before review of the rates was completed and before a final determination on the validity of those rates had been made. Rates as to which review was pending were not made effective until review was complete and the rate confirmed and approved.

States Department of the Interior, Southwestern Power Administration, 18 F.P.C. 153, 157 (1957) (SWPA general rates); *United States Department of the Interior, Southeastern Power Administration*, 20 F.P.C. 1, 2 (1958) (Kerr project rates); *United States Department of the Interior, Southwestern Power Administration*, 22 F.P.C. 634, 636 (1959) (SWPA peaking power rates); *United States Department of the Interior, Southwestern Power Administration*, 24 F.P.C. 1077, 1079 (1960) (Woodruff Project rates); *United States Department of the Interior, Southwestern Power Administration*, 27 F.P.C. 895, 898 (1962) (SWPA peaking power rates); *United States Department of the Interior, Southwestern Power Administration*, 32 F.P.C. 4, 8 (1964); *United States Department of the Interior, Southwestern Power Administration*, 35 F.P.C. 406, 408 (1966); *United States Department of the Interior, Southwestern Power Administration*, 40 F.P.C. 171, 172 (1968) (SWPA rate extension); *United States Department of the Interior, Southwestern Power Administration*, 43 F.P.C. 804, 808 (1970); *United States Department of the Interior, Southeastern Power Administration*, 48 F.P.C. 333, 334 (1972) (SEPA rate extension); *United States Department of the Interior, Southeastern Power Administration*, 49 F.P.C. 1477, 1480 (1973); *United States Department of the Interior, Southwestern Power Administration*, 51 F.P.C. 127, 129 (1974); *United States Department of the Interior, Southeastern Power Administration*, 53 F.P.C. 1948, 1950 (1975). In each of the above orders, the proposed contract, rate increase or rate extension was ordered effective as of the date the confirming order issued or as of some later date. These orders are only examples; space limitations prevent the listing of the many other confirmation and approval orders which follow this pattern. Clearly, the FPC understood its obligation to confirm the rates before they became effective; *no* interim rate increases pursuant to the Flood Control Act were allowed during the period from 1944 to 1974.

As the Court has recognized,

> the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time.

United States v. *Clark*, 454 U.S. 555, 565 (1982). The FPC's consistent practice for over thirty years following enactment of the Flood Control Act of allowing only final rates to be imposed, though not determinative, is strong evidence which entirely supports both the plain meaning of the Act and the purposes and limitations suggested by the legislative history. All of the evidence advances the conclusion that only final rates can be charged.

The Government offers one FPC order under the Flood Control Act to justify its contention that that Act has always conferred interim ratemaking authority. In the first place, a sole instance of agency practice will garner little or no judicial regard when a statute is being interpreted, especially where that instance represents a departure from prior consistent agency practice. *See, e.g., NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). Second, the exercise of purported authority in the order cited by the Government, *In re United States Department of the Interior, Southeastern Power Administration*, 54 F.P.C. 3 (1975), was strongly opposed by the Department of the Interior. The Government finds itself hard pressed to explain away the Assistant Secretary's direct indictment, contained in a July 11, 1975 letter to the FPC:

> . . . the Commission does not have authority to make its confirmation and approval conditional upon the outcome of further proceedings or upon the agreement by SEPA to make refunds or credits if the Commission changes its mind . . .

C.A. App. 357. It was precisely this type of authority which the Department of Energy claimed to have inherited when

imposing the interim increase now under review. But as we have seen, and as the Secretary of the Interior properly emphasized in a subsequently-filed brief in the 1975 proceeding, the intentionally limited authority conferred on the FPC by § 5 necessarily precludes any implication of interim rate authority. C.A. App. 380-384.[21]

B. The Department Of Energy Organization Act Did Not Materially Alter The Requirements Of The Flood Control Act, Nor Did The DOE Act Endow The Secretary Of Energy With New Interim Rate-Setting Authority

Because it does not allow for interim rates, Section 5 of the Flood Control Act endowed the Secretary of Energy with no authority to impose interim rates. In the delegation order establishing interim rate procedures for SWPA power, the Secretary claimed authority to do so under the Department of Energy Organization Act. However, the DOE Act was procedural legislation which created no authority which had not already been created by Congress. Therefore, the DOE Act conferred on the Secretary no power marketing authority not already contained in, *inter alia*, the Flood Control Act.

The DOE Act transferred authorities under existing statutes, including those under Section 5 of the Flood Control Act, to the newly created Department of Energy. DOE Act, §§ 301(b), 302(a)(1), 42 U.S.C. §§ 7151(b), 7152(a)(1). Nothing in the language of these bare transfers of functions

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[21] The Government offers two FPC interim rate orders under the Bonneville Project Act. First, these are *not* administrative interpretations of the Flood Control Act. Second, they are only two examples and they conflict with longstanding prior practice. Third, they are *wrong*, that is, *ultra vires* acts which offer no rationale for the departure and no guidance for the Court. The Court of Claims below reviewed each of these cases and found them not applicable. Gov't Pet. at 15a-17a.

lends any weight to the Government's argument that something more was vested in the Secretary. Support for the common sense view that mere transfer did not enlarge the transferred authority is found elsewhere in the language of the DOE Act. Section 641, 42 U.S.C. § 7251, states the Secretary's general authority with regard to the transferred functions:

> To the extent necessary or appropriate to perform any function transferred by this Act, the Secretary or any officer or employee of the Department may exercise, in carrying out the function so transferred, any authority thereof *available by law*, including appropriation Acts, to the official or agency from which such function was transferred.

(Emphasis added.)

Because interim rate authority was not available under the Flood Control Act to the Department of the Interior or to the FPC, the Secretary may not exericse that type of authority in performing those transferred functions.

Further, Congress clearly understood and intended that the Secretary would not have any authority greater than that transferred. When the House of Representatives considered the bill, H.R. 6804, to establish a Department of Energy, Congressman Brooks, the chair of the Governmental Operations Committee, opened debate by stating the general intent of the Committee on the bill:

> One point I want to emphasize is that this bill does not create any new authority, power or programs. The . . . Committee has made every effort to avoid altering any substantive law. It is the intent of the committee that neither the Secretary nor any other officer of the department have any authority that does not presently exist somewhere in the Federal Government.

123 Cong. Rec. H5269 (1977). Chairman Brooks considered the point worth repeating as he concluded his statement to the House:

> Finally, I want again to emphasize that the Secretary will not have any powers that have not been created by Congress . . .

123 Cong. Rec. 5270 (1977). These introductory statements by the House floor manager of the Bill should definitely be accorded weight in the construction of the DOE Act. *See United Brotherhood of Carpenters and Joiners of America* v. *Scott*, —— U.S. ——, 103 S.Ct. 3352 (1983).

Although the restructuring was sought to allow for coordination of energy policy and "effective *management* of energy functions of the Federal government" DOE Act § 102(2), 42 U.S.C. § 7112 (emphasis added), those functions were not changed by the Act. In hearings before the Senate Committee on Governmental Affairs, the Chairman of the FPC was pressed to explain the effect of the Administration's proposed transfers of energy functions, particularly with respect to the abolition of the FPC.

> . . . there is need for reorganization of the way we handle energy affairs in the U.S. Government. That must be changed irrespective of whether a single substantive change is subsequently made.
>
> In other words, I can separate the two in my own mind. We need boxes rearranged, if you will, irrespective of whether or not the Natural Gas Act, the Power Act, the ESECA, and all of the other acts are subsequently changed.

Department of Energy Organization Act: Hearings Before the (Senate) Comm. on Governmental Affairs . . . on S. 826, 95th Cong. 1st Sess. 189 (1977) (remarks of FPC Chairman Dunham). With specific reference to the transfer of power marketing authority, the Secretary of the Interior assured the Committee that all existing limitations on that authority would be continued:

> Senator Metcalf. There are some special agencies that work under the Department of Interior such as the Bonneville Power Administration and the Southeastern Power Administration and so forth.

Are they going to still have their status under the Department of Energy?

• • •

MR. ANDRUS. Mr. Chairman and Senator, the authorities that presently exist with the Bonneville Power Administration, as an example that you point out, would be transferred to the Department of Energy.

SENATOR METCALF. And all statutory regulations that we have——

MR. ANDRUS. And Mr. Chairman, all of the statutory provisions would transfer with it.

SENATER METCALF. That have been put on such an agency as the Bonneville Power Administration?

MR. ANDRUS. Yes.

SENATOR METCALF. That would include such things as the preference clause?

MR. ANDRUS. Yes, sir.

Hearings on S. 826, at 178-179. Thus, FPC Chairman Dunham's subsequent comments regarding greater coordination of power marketing rate functions[22] must be seen in context as an indictment of agency policy conflicts, and not as advocacy of substantive change to the underlying statutes.

Congress did not give the Secretary of Energy "plenary" authority over rates; it only gave him the authority that existed under the Flood Control Act. The Government's arguments to the contrary (Gov't Brief at 25-27), in addition to being rebutted by the language of the Act and by the congressional intent to grant no new authority, are unpersuasive otherwise.

First, the Government's arguments fail to take account of the requirements of § 302(a)(2) of the DOE Act, 42 U.S.C. § 7152(a)(2), that the rate proposal function of

[22] *Hearings on S. 826*, at 179.

the Department of the Interior under Section 5 of the Flood Control Act continue to be exercised by and through the administrators of the Power Marketing Administrations (PMAs). Congress wished to ensure that the PMAs retain their separate and distinct identities as regional agencies responsive to local conditions and concerns. *See* S. Rep. No. 95-164, 95th Cong., 1st Sess. 29-30 (1977). Thus Congress strove to ensure that bifurcated decision-making with respect to federal power rates would continue. Clearly, Congress did *not* intend that the Secretary of Energy exercise undivided and absolute power over the rates.

A second, related, flaw in the Government's argument is its failure to give due regard to the command of § 501(a)(1) of the DOE Act that:

> If any provision of any Act, the functions of which are transferred, vested, or delegated pursuant to this Act, provides administrative procedure requirements in addition to the requirements provided in this title, such additional requirements shall also apply to actions under the provision.

42 U.S.C. § 7191(a)(1). Since § 5 of the Flood Control Act was drafted so as to bar implementation of rates before the completion of full administrative review, Section 501(a)(1) of the DOE Act mandates that that restriction continue to apply to the transferrees of the § 5 rate-making functions in the new Department of Energy. Section 501(a)(1) is also a general repudiation of the "merger" argument advanced here by the Government. If the Department of Energy is required to honor the limitations attached to the functions it received, then the Department cannot avoid these limitations through the amalgamation (on paper) of those functions. Any other construction would render § 501(a)(1) meaningless.

Third, the Government's argument fails to recognize that, although Congress gave to the Secretary of Energy both the rate proposal and the rate confirmation and ap-

proval function, Congress did not alter the requirement of the Flood Control Act that the confirmation and approval function be *completed* before new rates may be imposed. Thus, while the Secretary could delegate and divide that function amongst subordinate officials and agencies, he lacks the power under the Flood Control Act to "jump the gun" and order any new rate to take effect while the mandated confirmation and approval function is not complete. Only "upon confirmation and approval" may the rate take effect. In this case, the rate review the Secretary delegated to the FERC was indistinguishable from that which the FPC exercised under § 5 of the Flood Control Act. Therefore, the activity the FERC was engaged in was part of the approval and confirmation function required by § 5. The FERC, as the Government cannot deny, was *not* engaged in some type of review outside of the Flood Control Act. *See United States Secretary of Energy, Southwestern Power Administration,* 18 F.E.R.C. ¶ 61,052 (1982). Therefore, until the FERC had completed its delegated portion of the confirmation and approval function required by the Flood Control Act, the new rate could not be allowed to take effect.

The question of how much process is provided is not at issue. If the Secretary designs review procedures within the Department sufficient to gauge a given rate schedule's validity as the lowest possible rate consistent with sound business practice, he or she may order the rate effective at the completion of that review. But when the rate's validity is uncertain, when review is pending, the rate may not be charged. Cities have not objected in this case to the process given; rather the validity of the rate, and therefore of the preliminary review conducted by the Assistant Secretary, was put in doubt by the Secretary himself when he delegated final confirmation and approval to the FERC. In effect, the review conducted by the FERC, auditing cost allocation and estimates in light of the Flood Control Act's mandates, is indistinguishable from the review previously

conducted by the F.P.C. *Compare United States Secretary of Energy, Southeastern Power Administration,* 18 F.E.R.C. ¶ 62,515 (1982) *with United States Department of the Interior, Southeastern Power Administration,* 48 F.P.C. 333 (1972). *See also, Sam Rayburn Dam, op cit.,* at A-15 ("... As a practical matter, the [FPC's] approval authority nows rests in the FERC"). The Government refuses to recognize what was persuasively articulated by the district court in the *Sam Rayburn Dam* case, and expressly adopted by the Federal Circuit Court of Appeals:

> . . . this Court concludes that both functions were transferred to the Secretary of Energy and that the original bifurcated process established by Section 5 of the 1944 Act was not discarded or altered but was transferred *in toto* to the Secretary of Energy. That transfer created no power to establish and collect an increased amount for the sale of the energy between the time the increase is proposed and the time it is approved. In short, there was no creation of a power to implement an interim rate.

Sam Rayburn Dam, Amicus Cert. Brief at A-14.

Fourth, the Government's argument lacks persuasive support.[33] The Fifth Circuit's *Tex-La* decision, in addition to its other faults (adopted by the Government and rebutted above) engages in the same sort of judicial legislation that led to reversal of the Fifth Circuit by this Court in *Griffin* v. *Oceanic Contractors, Inc.,* 458 U.S. 564 (1982) in which the Court stated that:

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[33] The Government also offers post-hoc legislative history relating to the Bonneville Power Administration's authority. (Gov't Brief at 30-31, n. 24). Such evidence of congressional intent has "very little, if any, significance", *United States* v. *Clark,* 445 U.S. 23, 33, n.9 (1980), especially where the question of the agency's authority and from whence it derives is not squarely presented to the Committee. In all likelihood, as in the *Clark* case, the committee simply relied on the agency's representations as to the "existing law."

> Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'

Id. at 570, *quoting Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *Tex-La* also fails to meet the standard of statutory construction set forth in *United States* v. *Rutherford*, 442 U.S. 544 (1979):

> Only when a literal construction of a statute yields results so manifestly unreasonable that they could not be attributed to congressional design will an exception to statutory language be judicially implied.

Id. at 555.

Fifth, and finally, the plenary rate cases cited by the Government (Gov't Brief at 25) are based on statutes which markedly differ from the Flood Control Act in the scope and in the degree of authority expressly conferred. *See* Section II A above. The state Public Utility Commission cases referred to also differ markedly, relying on express file and suspend authority[34] or on blanket grants of broad discretionary authority.[35] Most importantly, none of the statutes involved in the cases cited by the Government contains the Flood Control Act's plainly stated requirement that rates not become effective until after approval.

In sum, the Flood Control Act of 1944 requires confirmation and approval before new rates will be allowed to

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[34] *See, e.g., In re Kaui Electric Division*, 60 Hawaii 166, 590 P.2d 524, 534 (1978).

[35] *See, e.g., Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 217 Kan. 604, 538 P.2d 702, 710 (1975).

take effect. Since review here by the FERC was pursuant to that requirement, no new rate could be imposed before that review was complete, and the rate increase thereby confirmed and approved.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Cities of Fulton, Lamar and Thayer, Missouri request that the judgment of the United States Court of Appeals for the Federal Circuit in this matter be affirmed.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
(*Counsel of Record*)

WHEATLEY & WOLLESEN
1112 Watergate Office Bldg.
2600 Virginia Avenue, N.W.
Washington, D.C. 20037-1971
(202) 337-5543

October 23, 1985

APPENDIX

APPENDIX A

Charles F. Wheatley, Jr.
Wheatley & Wollesen
Washington, D. C.
July 5, 1985

Mr. Rex E. Lee, Esq.
Solicitor General of the
United States of America
Department of Justice
Washington, D.C. 20530

Re: *United States of America* v.
Fulton, Docket No. 84-1725

Dear Mr. Lee:

The Government has contended, in its Petition for Certiorari in the above-captioned matter, that more than $500 million might be subject to refund if the Claims Court and the Federal Circuit decisions in this case are not reversed. As you know, this figure is not a part of the record in this case, but was supplied to the Department of Justice, and only the Department of Justice, by the Department of Energy, and first raised in the Government's petition. Since the Supreme Court has granted *certiorari,* if the United States intends to rely on its $500 million impact argument when the case is considered on its merits, the Cities of Fulton, Lamar and Thayer believe that fairness and proper procedure demand that the Government now make available to the Cities the data and information which form the basis of the Government's contention. If Cities are denied an opportunity to review these data, then it will not be simply their own interests that are damaged. In that event, the Court would similarly be denied an opportunity for balanced and adversarial presentation of this contention.

For these reasons, the Cities ask that the Government provide Cities with copies of all studies, estimates and data, in whatever form, which form the basis for the Government's contentions as to the dollar value of the disposition of this case, as mentioned at pages 20 and 21 of the Government's Petition for Certiorari. Please provide all workpapers and related documents relied on, used by, or produced by government agents, employees or contractors to develop these figures and/or any other estimates as to the value of the issues in this case. Please provide all contracts between the Government and any hydroelectric power customers whom the Government believes or contends may be able to bring claims for refunds before the U.S. Court of Claims, if the Court of Claims and Federal Circuit decisions are not reversed. Please state why the Government's estimate of the value of the disposition of the issues in this case changed from $800 million (as referred to in the Government's Brief to the Federal Circuit, at p. 3) to $500 million. Please provide all documents, memoranda, workpapers, etc., incorporating the decision to revise the figure or relating to that decision.

We request that this data be made available to us within thirty days in view of the strict briefing schedule in this case.

Cities wish to emphasize their concern that extra-record evidence not be used in the briefs on the merits in this case, especially where there has been no adjudication or discovery of such evidence made available to the plaintiffs.

Sincerely yours,

/s/ Charles F. Wheatley, Jr.
Charles F. Wheatley, Jr.,
Counsel of Record for
the Respondents

U.S. DEPARTMENT OF JUSTICE
Office of the Solicitor General

July 12, 1985

Charles F. Wheatley, Jr., Esq.
Wheatley & Wollesen

Dr. Mr. Wheatley:

Thank you for your letter dated July 5, 1985, to former Solicitor General Lee concerning *United States* v. *City of Fulton*, No. 84-1725. The government does not intend to rely in its brief on the merits upon the potential monetary liability of $500 million resulting from the Federal Circuit's decision in this case. In our view, that fact was relevant to the question whether the Court should grant certiorari (see Sup. Ct. R. 17), not the legal issue presented in the case.

Sincerely yours,

/s/ Kenneth S. Geller
Kenneth S. Geller
Deputy Solicitor General

STATUTORY APPENDIX

1. Section 641 of the Department of Energy Organization Act, 42 U.S.C. § 7251, provides:

> To the extent necessary or appropriate to perform any function transferred by this Act, the Secretary or any officer or employee of the Department may exercise, in carrying out the function so transferred, any authority or part thereof available by law, including appropriation Acts, to the official or agency from which such function was transferred.

2. Section 705(a) of the Department of Energy Organization Act, 42 U.S.C. § 7295(a), provides:

> All orders, determinations, rules, regulations, permits contract, certificates, licenses, and privileges—
>
> (1) which have been issued, made, granted, or allowed to become effective by the President, any Federal department or agency or official thereof, or by a court of competent jurisdiction, in the performance of functions which are transferred under this Act to the Departmentment or the Commission after the date of enactment of this Act, and
>
> (2) which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the President, the Secretary, the Federal Energy Regulatory Comission, or other authorized officials, a court of competent jurisdiction, or by operation of law.

REPLY

BRIEF

(8)

No. 84-1725

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF FULTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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We demonstrated in our opening brief that both the relevant statutes and the contracts between the United States and respondents authorize the Secretary of Energy to place into effect interim increases in the rates paid by respondents for power generated by federal hydroelectric projects. Nothing in respondents' answering brief refutes our position.

1. At the outset, respondents plainly are incorrect in their view (Br. 13-25) that the meaning of the contract terms concerning rate increases can be distinguished from the scope of the statute governing the Secretary of Energy's authority to set rates for sales of hydroelectric power. As we showed in our opening brief (at 31-34), the contract provisions essentially incorporate the language of the relevant statute, Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, and the only possible conclusion is that the

contracts allow the Secretary to impose any rate increase that is authorized by the statute. Moreover, the duration of two of the contracts is 10 years and the term of the third contract is 20 years (see C.A. App. 103, 136, 171). It is especially unlikely that the government would have entered into long-term contracts limiting its rate-setting authority without specifically describing the particular limitation. The language of the contracts broadly authorizing rate changes "at any time" upon action by the Federal Power Commission also undercuts respondents' argument that the contracts impose such a limitation (C.A. App. 93, 127, 157). The contracts thus should be read to incorporate the terms of the statute; they do not impose a separate restriction upon the Secretary's rate-setting authority.

Indeed, respondents themselves recognize the similarity between the contracts and the statute. They rely upon their interpretation of the statute to support their construction of the contract provisions (see Br. 22-23) and they invoke virtually identical arguments to justify their interpretation of the contract terms and the statutory language (compare Br. 16 with Br. 26-27). Respondents also implicitly acknowledge that the contract terms do not independently limit the government's authority. Thus, respondents do not contest the validity of the rate increase on the ground that the contracts require that a new rate must be proposed by the Secretary of the Interior and approved by the Federal Power Commission. Respondents therefore recognize that the contract language simply reflects the former statutory procedural requirements and has no independent force.[1]

---

[1]Respondents claim (Br. 23-25) that their contracts were not altered by the enactment of the Department of Energy Organization Act. We do not contend that the meaning of the contracts was changed; both before and after the passage of the Act the contracts simply incorporated the statutory procedures for increasing power rates, with the result that any rate increase that is lawful under the relevant statute is permissible under the contracts.

At a minimum, in view of the close similarity between the contracts and the statute, respondents (who sued the government for breach of contract) had the burden of presenting evidence that the parties did not intend simply to incorporate the statutory rate-setting procedures into the contract. Since respondents presented no such evidence, there is no justification for construing the contracts as an independent limitation on the Secretary's authority.[2]

Finally, respondents' contention that the contracts specifically bar interim rate increases is plainly wrong. They first rely (Br. 16) upon the express language of the contracts, asserting that a rate increase cannot become effective until all administrative review of the rate is completed. However,

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[2]Respondents assert (Br. 17-19) that their interpretation of the contracts is supported by decisions construing rate-setting provisions in other power sales agreements under the *Mobile-Sierra* doctrine, but the cases upon which they rely are completely irrelevant. Most of these decisions address whether a particular contract allowed a private utility to effect a unilateral rate increase by utilizing the procedures of Section 205 of the Federal Power Act, 16 U.S.C. 824d, or Section 4 of the Natural Gas Act, 15 U.S.C. 717c. These statutes, and the underlying regulatory processes, are different from the provision of the Flood Control Act governing the rate changes at issue here. Whether some contractual term permitted a rate increase under these statutes therefore is not at all relevant to whether the contracts at issue here incorporate the provision of the Flood Control Act relating to rate increases. The one case cited by respondents that relates to the Flood Control Act is similarly inapposite. *Arkansas Power & Light Co.* v. *Schlesinger*, Civ. No. 79-1263 (D.D.C. Oct. 20, 1980), appeal dismissed, No. 80-2573 (D.C. Cir. Jan. 26, 1981), involved the interpretation of a contract that expressly limited the amount of rate increases for each five-year interval over the life of the contract.

Respondents also contend (Br. 19-20) that the contracts should not be interpreted to authorize interim rates because they should be construed against the government, the party that drafted the agreements. However, that principle of contract interpretation applies only when a provision is "ambiguous" (*United States* v. *Seckinger*, 397 U.S. 203, 216 (1970)) and there is no ambiguity here; respondents' contracts simply incorporate the terms of the statute.

the contracts themselves require only "confirmation and approval," and the Assistant Secretary of Energy expressly "confirmed" and "approved" the interim rate before it was placed into effect (U.S. Br. 7). Since the contracts, like the statute, do not require "final" confirmation and approval, interim rates obviously are permissible under the contracts. See pages 5-6, *infra*.

Respondents also claim (Br. 17-18) that decisions construing other power sales agreements support their position, but these decisions actually reveal the flaw in respondents' argument. For example, one case concerned a contract permitting a rate increase in accordance with "a valid applicable order of any governmental authority;" the court held that a unilateral rate filing by the private utility did not satisfy this requirement. *Louisiana Power & Light Co.* v. *FERC*, 587 F.2d 671, 675 (5th Cir. 1979); see also *City of Kaukauna* v. *FERC*, 581 F.2d 993, 996 (D.C. Cir. 1978) (contract provision permitting new or changed rates "as are ultimately made effective through [FERC] proceedings and review"). Here, of course, the interim rate increase was "confirmed" and "approved" and placed into effect pursuant to an order issued by the Assistant Secretary. Since the interim rate was measured against the relevant statutory standard before it was placed into effect, it more closely resembles an order issued by the FERC than it does a unilateral filing by a private utility. Respondents' analogy thus demonstrates the permissibility of interim rate increases under their contracts.[3]

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[3]Respondents also contend (Br. 20-21) that the fact that the government did not impose an interim rate increase until 1974 established a course of dealing between the parties that indicates that the contracts bar such rate increases. However, a course of dealing is a sequence of conduct "which is fairly to be regarded as establishing a *common basis of understanding*" for interpreting the contract (Restatement (Second) of Contracts § 223 (1981) (emphasis added)). The conduct cited by respondents is ambiguous. There is no evidence that the government interpreted the contracts as barring interim rate increases; instead, the government simply had no need to exercise that authority (see page 10, *infra*). Respondents' unilateral assumption concerning the meaning of the contracts is not a ground for interpreting the contracts as precluding interim rate increases. *Sperry Flight Systems Division of Sperry Rand Corp.* v. *United States*, 548 F.2d 915, 922-923 (Ct. Cl. 1977).

2. Our principal argument (Br. 14-24) is that Section 5 of the Flood Control Act authorizes the Secretary to impose interim rate increases subject to a refund with interest if a lower permanent rate is adopted. Section 5 does not by its terms distinguish between interim rate increases and permanent rate increases, and Congress's clear intent to confer broad authority for the sale of power generated by federal hydroelectric projects leaves no doubt that the statute permits both types of rate increases.[4]

a. Respondents argue (Br. 26-29) that interim rate increases are barred because of the statutory requirement that rate schedules "become effective upon confirmation and approval by the Federal Power Commission." 16 U.S.C. (1976 ed.) 825s. Of course, this language does not expressly prohibit interim rate increases. Respondents' rather convoluted semantic argument boils down to their contention that the statute requires final approval of a rate increase before the rate increase can be placed into effect; in their view a rate schedule cannot be "confirmed" and "approved" when it remains subject to further review. Despite respondents' fervent efforts to read the statute to require "final" confirmation and approval before the implementation of a rate increase, Congress did not include that requirement in Section 5. See Pet. App. 59a. The statutory

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[4]Respondents assert (Br. 7-8) that this argument is a departure from our prior position regarding the meaning of Section 5, but we presented this argument in the court below (C.A. Br. 34-37) and before the Fifth Circuit (C.A. Br. 38-40) in *United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F.2d 392 (1982).

language permits the confirmation and approval of an interim rate pending the approval of a permanent rate.[5]

Contrary to respondents' claims, this result is not illogical. The Court approved a similar procedure in *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978), upholding the Interstate Commerce Commission's authority in effect to establish interim rates (see U.S. Br. 25-26), and the practice is a common feature of rate-making.[6] Moreover, just as a court may issue a temporary restraining order and a preliminary injunction and then revisit the substantive issue in the case when deciding whether to issue a permanent injunction, the FPC could review the relevant issues based on preliminary submissions and then finally determine the propriety of a rate upon a more complete record. This is in fact what the Commission did when it placed interim rates into effect. See, *e.g.*, *United States Department of the Interior, Bonneville Power Administration*, 59 F.P.C. 1194 (1977); *United States Department of the Interior, Southeastern Power Administration*, 54 F.P.C. 1631, 1633 (1975) (characterizing Commission action as "conditional interim approval").[7]

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[5]Indeed, the lengths to which it is necessary to go in order to interpret Section 5 as prohibiting interim rates are demonstrated by the "[g]rammatical" argument proffered by amicus Sam Rayburn Dam Electric Cooperative, Inc. (Br. 6-7 n.6).

[6]See W. Jones, *Cases and Materials on Regulated Industries* 123 (2d ed. 1976); F. Welch, *Conduct of the Utility Rate Case* 70-71 (1955); see also U.S. Br. 25 n.21 (decisions upholding interim rate authority).

[7]Respondents assert (Br. 28-29 & n.23) that the absence of express statutory language authorizing interim rates and refunds is determinative. As we explained in our opening brief (at 18 n.13), however, it is not surprising that Congress gave broad discretion to the Secretary of the Interior and the Federal Power Commission to define the process for setting rates in connection with this federal proprietary activity.

b. Respondents also contend (Br. 29-36) that the legislative history supports their narrow reading of the statute, but they do not dispute that Congress intended to endow the Secretary of the Interior and the Federal Power Commission with broad authority to set rates for hydroelectric power. In our view, the power to impose interim rates logically must be included in this broad grant of authority, especially in light of the fact that interim rates are often instrumental in satisfying the statutory requirement of recovering all costs. U.S. Br. 16-20.[8]

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[8]Respondents attempt to rebut our argument concerning the usefulness of interim rates by asserting (Br. 8) that the Southwestern Power Administration (SWPA) rate at issue here must be presumed sufficient to recover the SWPA's costs because the rate was approved by the Federal Energy Regulatory Commission. Respondents ignore the fact that one reason the rate was sufficient to recover the SWPA's costs is that the rate was placed into effect on an interim basis and thus generated additional revenue for the 33 months it was in effect prior to implementation of the final rate.

Contrary to respondents' statement (Br. 8), we do not contend that the statute should be construed to authorize interim rates simply because the SWPA has failed to collect revenues sufficient to cover its costs. This fact is not in any way essential to our argument; we believe it is relevant because it explains why the Secretary has chosen to invoke his interim rate authority, why this authority was not needed in the past, and why the use of this authority is consistent with Congress's goal of a rate structure based upon sound business principles. Moreover, respondent's argument that these facts are not in the record is beside the point. Even if the facts regarding the SWPA's financial condition are considered adjudicative facts rather than legislative facts, the sources that we cite (see U.S. Br. 5-7) surely are subject to judicial notice (see Fed. R. Evid. 201).

Finally, respondents make the rather silly claim (Br. 8 n.6) that we have "abandoned" our position that more than $500 million might be subject to refund under the rule adopted by the courts below. As the exchange of letters in the appendix to respondents' brief clearly shows, we stated that we would not rely on this fact in our brief on the merits because it was relevant only to the question whether certiorari should be granted. We stand by the Department of Energy's estimate of the government's potential liability.

Respondents do not present a single legitimate policy objective that could have impelled Congress to withhold interim rate-setting authority. Respondents first argue that the statute should not be interpreted to permit the imposition of interim rates because Congress intended to broadly distribute to consumers the benefits of low-cost hydroelectric power. The statute itself answers this argument; it provides that power should be distributed "at the lowest possible rates to consumers *consistent with sound business principles*" (16 U.S.C. 825s (emphasis added)). Thus, Congress plainly placed primary importance on creating a sound rate structure that will result in revenues sufficient to recover the costs of producing the electricity, and, as we have discussed, interim rate authority is helpful in accomplishing that end (U.S. Br. 19-20).[9]

Respondents several times assert (Br. 9, 22-23, 34) that interim rates injure consumers even where, as here, a refund with interest is required if a lower permanent rate subsequently is placed into effect. We do not dispute that interim rates may well increase respondents' costs by preventing them from benefiting from delay in the regulatory process, but nothing in the statute or its legislative history indicates that Congress intended to allow purchasers of electric power to obtain that benefit at the expense to the government of revenues that would help recover costs. Although this Court has observed that refunds to customers in some circumstances may be an imperfect remedy (*FPC* v.

[9]Of course, it may be possible to recoup revenue lost because of delay in the implementation of a rate increase in a subsequent rate increase, but the additional delay would result in a further postponement of the obligation to meet all costs and repay the investment of the United States in power generating facilities (see U.S. Br. 2-3). Moreover, it is most "consistent with sound business principles" to allocate the costs of generating electricity to those who use that electricity, not to future users.

Tennessee Gas Transmission Co., 371 U.S. 145, 154-155 (1962)), it made that statement with reference to an interim rate that was not subject to any regulatory scrutiny before it was placed into effect. In addition, the question in *Tennessee Gas* was whether the Commission had the authority to order a refund when the proceeding was not fully completed; the Court did not indicate that interim rates were an inappropriate regulatory device.

The situation presented here is fundamentally different from *Tennessee Gas* because the interim rate in this case was subject to regulatory scrutiny, including public notice and comment, before it was placed into effect (see U.S. Br. 4-5, 6-7). Indeed, the interim rate increase at issue here was reduced from 42% to 33% pursuant to this regulatory process (see U.S. Br. 7). Thus, the requirement of refunds and regulatory review prior to the imposition of the interim rate increase provides substantial safeguards against consumer injury as a result of the imposition of unjustified interim rate increases.[10]

Respondents also contend that their interpretation of the statute is supported by the fact that Congress chose to permit the Federal Power Commission to confirm and approve rates and did not authorize the FPC to revise the rates submitted by the Secretary of the Interior. This theory suffers from the same flaw as respondents' argument concerning the language of the statute. Although it is clear that

[10]Respondents claim (Br. 9) that interim rates should be disfavored because they remove an incentive for expeditious agency action and because purchasers face the dilemma of whether to pass the increases through to their customers. First, there is no reason to bar interim rates, and thereby subject the government to a monetary penalty, in order to reduce regulatory delay. Less draconian measures, such as time limits for agency action, plainly are more appropriate. Second, whatever choice respondents make in structuring their own rates, they are assured of recovering their payments to the government pursuant to the interim rate.

Congress intended to require FPC approval before rates were placed into effect, respondents cite nothing in the legislative history to demonstrate that a final determination by the FPC regarding the particular rate was a prerequisite to placing the rate into effect. If the Secretary requested the imposition of an interim rate, the FPC was thus free to confirm and approve the rate on a temporary basis pending future action relating to a permanent rate.[11]

c. Finally, respondents argue (Br. 36-39) that the fact that the FPC did not approve an interim rate increase until 1974 "is strong evidence" that "only final rates can be charged" (Br. 38). First, respondents' position is contradicted by the post-1974 interim rates increases (U.S. Br. 20-22).[12] Second, as we noted in our opening brief (at 5), it was not until the rampant inflation of the early 1970s that interim rates became necessary to ensure that revenues would cover expenditures. Third, respondents' argument is based solely upon the absence of any interim rate increases; the FPC did not affirmatively state that it lacked the power to place rates into effect on an interim basis. In similar circumstances this Court has observed that "[t]he failure of [an agency] to act is not a binding administrative interpretation" of the scope of the agency's authority. *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 590 (1957); see also *Baltimore & O. Ry.* v. *Jackson*, 353 U.S.

[11]The testimony of Secretary of the Interior Ickes, upon which respondents place great emphasis (Br. 34-36), does not support a contrary conclusion. Secretary Ickes simply confirmed that the FPC had "final authority" regarding a rate increase because FPC action was required before a rate could be placed into effect.

[12]These interim rate increases are indistinguishable from the rate increase at issue here; they were not the sort of interim increases described by respondents (Br. 36 n.30).

325, 331 (1957) (it is improper to "elevat[e] negative action to positive administrative decision").[13]

Thus, respondent's interpretation of the statute on the basis of administrative inaction should be rejected. Instead, the statute should be construed in accordance with the interpretation affirmatively adopted by the Federal Power Commission and reaffirmed by the Secretary of Energy, the official now charged with the administration of the hydroelectric power marketing program (see U.S. Br. 29-30).

d. Respondents do not dispute our showing (Br. 22-24) that the Department of Energy Organization Act transferred to the Secretary of Energy all authority under Section 5 of the Flood Control Act. See Resp. Br. 43-44 ("Congress gave to the Secretary of Energy both the rate proposal and the rate confirmation and approval function"). Accordingly, the Secretary may exercise the interim rate authority that was conferred on the Secretary of the Interior and the Federal Power Commission by Section 5.

3. We also demonstrated in our opening brief (at 25-27) that the Department of Energy Organization Act independently authorizes the imposition of the interim rates at issue

[13]Contrary to respondents' claim (Br. 38), we are not "hard pressed" to explain the Interior Department's comments regarding the 1975 interim rate increase. We explain in our opening brief (at 21 n.16) that the Interior Department's objection was based upon the fact that the Secretary of the Interior had not proposed an interim rate; Interior did not claim that the FPC had no authority to confirm and approve interim rates.

Indeed, it is respondents who are hard pressed to explain away the interim rate orders issued pursuant to the virtually identical language of the Bonneville Project Act (see U.S. Br. 21-22). Their unsupported assertions (Br. 39 n.31) do not undermine the relevance of these administrative actions in interpreting Section 5 of the Flood Control Act. It is especially peculiar that respondents view the legislative history of the Bonneville Project Act as probative of the proper interpretation of Section 5, but assert that the administrative practice under the Bonneville statute is irrelevant.

here because it endows the Secretary of Energy with plenary authority over hydroelectric power rates. Since the statute consolidates all rate-setting authority in the Secretary, the Secretary could simply have delegated to the Assistant Secretary all authority to confirm and approve rates without providing for additional review by the FERC. It is therefore difficult to see how the additional review *detracts* from the Secretary's authority to place interim rates into effect.[14] Interpreting the statute to invalidate the Secretary's order serves no policy goal and simply has the result of allowing respondents to gain the benefit of regulatory delay. In analogous situations, this Court has upheld the exercise of such ancillary interim rate-setting authority (see U.S. Br. 25-26).[15]

Respondents assert (Br. 40-41) that Congress did not intend to alter existing substantive authority by enacting the Department of Energy Organization Act, and that the Secretary therefore could not gain ancillary interim rate-

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[14]Indeed, the function attributed to the Federal Power Commission by respondents (Br. 8-9 & n.7)—the protection of consumers from excessive rate increases—had been performed before the interim rate at issue here was placed into effect; the proposed increase was reduced from 42% to 33%. It was the FERC that at first rejected the rate because it was *too low*. See U.S. Br. 7.

[15]Respondents claim (Br. 42-43) that the Secretary of Energy does not exercise plenary authority over rates because the Secretary of the Interior's rate-proposing function is exercised by the administrators of the Power Marketing Administrations (PMAs). However, the statute states that this authority "shall be exercised by the Secretary" (42 U.S.C. 7152(a)(2)) and provides that the Secretary has the authority to appoint the administrators (*ibid.*). It is thus clear that the Secretary controls the exercise of this authority.

Respondents contend (Br. 43) that the Secretary's exercise of interim rate authority is barred by Section 501(a)(1) of the Department of Energy Organization Act, 42 U.S.C. 7191(a)(1). But, as we demonstrated in our opening brief (at 28-29 & n.22), Section 501(a)(1) relates only to procedural requirements.

setting authority as a result of the consolidation of the functions of the Secretary of the Interior and the Federal Power Commission. The flaw in this argument is that the Secretary has not gained additional substantive authority; the consolidation of all Section 5 rate-setting authority simply permits him to exercise the existing authority in a different manner. Here, the Secretary has determined that it is appropriate to bifurcate the process for setting power rates. Efficiencies of this type were precisely what Congress sought to achieve when it enacted the Department of Energy Organization Act (see U.S. Br. 23).

Respondents also argue (Br. 43-44) that the Secretary cannot take such action because Section 5 bars a rate increase from being placed into effect when the rate increase is subject to further administrative review, even if the rate increase has been confirmed and approved. This argument rests on the view that Section 5 does more than just fail to confer interim rate-setting authority upon the Secretary; respondents can prevail only if they establish that the statute *affirmatively prohibits* the implementation of rates that have been confirmed and approved when such rates are subject to further administrative review. There is no basis for such a restrictive reading of the statute. As the Fifth Circuit observed in *United States* v. *Tex-La Electric Cooperative, Inc., supra,* that result would invalidate the Secretary's interim rate-setting procedure because "it gave litigants *too much* 'process' by giving them one last, truly independent review before the FERC" (Pet. App. 66a (emphasis in original)). Nothing in the statute or legislative history of Section 5 requires such a peculiar result.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1986

AMICUS CURIAE

BRIEF

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BRIEF AMICUS CURIAE OF SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC., IN SUPPORT OF RESPONDENTS

RALPH J. GILLIS *
GILLIS & CAMPBELL
Suite 227
160 Old Derby Street
Hingham, Massachusetts 02043
(617) 749-2432

ROBERT D. WILLIS
303 North Jackson Avenue
Livingston, Texas 77351
Attorneys for Sam Rayburn Dam Electric Cooperative, Inc.

* Attorney of Record

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BRIEF AMICUS CURIAE OF SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC., IN SUPPORT OF RESPONDENTS

Sam Rayburn Dam Electric Cooperative, Inc. (Sam Rayburn), *amicus curiae*, respectfully supports the City of Fulton, *et al.*, respondents in this action, on the merits.[1]

Statement of Interest

Sam Rayburn is an incorporated Texas quasi-governmental entity[2] which purchases the output of Sam Rayburn Dam on the Angelina River, Texas, from the Southwestern Power Administra-

[1] Letters of the parties giving permission for this brief are on file with the Clerk.

[2] Sam Rayburn's members include the cities of Jasper, Liberty, and Livingston, Texas, the Town of Vinton, Louisana, the Sam Houston, Jasper-Newton and Houston County Electric Cooperatives, the Sam Rayburn Municipal Power Agency and Sam Rayburn G&T.

tion (SWPA). Sam Rayburn monitors SWPA hydropower rates (1) to insure rates are designed in compliance with the Flood Control Act of 1944, Section 5, 16 U.S.C. 825s, for cost recovery, and widespread distribution, and (2) to insure that the Secretary and Department of Energy (DOE), act in compliance with Section 5 requirements in sales of, and rate implementations for such power and energy.

Sam Rayburn's interest in the instant case arises from the impact of the Secretary's illegal pre-final rate implementations which expose Sam Rayburn (1) to multiple pre-final rate implementations (pancaking), and (2) to deferral of immediate judicial review on rates becoming effective. In addition, and perhaps more importantly, Sam Rayburn and others would be impacted through judicial ratification of the Secretary of Energy's unilateral rewriting of the Flood Control Act, Section 5, to eliminate its preclusion of pre-final rate implementations without resort to Congress. *Compare* U.S. Rep. Mem. at 2 n. 2; U.S. Br. at 13, 33.

Statement

The statutes involved are contained in Appendix A hereto.

1. The most significant aspect of the Government's Brief is that, while it cites *United States* v. *Tex-La* (supplying a copy at Pet. 24a), it never mentions the Federal Circuit below rejecting *Tex-La* and adopting the legal reasoning of the district court in *United States* v. *Sam Rayburn* (*Amicus* Brief in Op. to Cert. at A-1, hereinafter "Am. Op."), "For the proposition that in transferring both the rate formulation and rate approval functions to the Secretary of Energy there was no creation of a power to implement interim rates." *City of Fulton* v. *United States*, Pet. at 3a (Fed. Cir.).

2. As an additional example of the Government's unusual tactics, consider that the Court of Claims decision in *Fulton*, Pet. at 5a, is set up as a "straw man" characterized as having erroneously found that all rate-making power of the FPC was transferred to the Federal Energy Regulatory Commission (FERC) by the De-

partment of Energy Organization Act (DOE Act) 42 U.S.C. 7101, *et seq*. U.S. Br. at 27. This characterization is made without citation, and is intentionally misleading as evidenced by the Government's quotation of the relevant *Fulton* language earlier in its brief (U.S. Br. at 9). Thus, the Court of Claims actually wrote: "*many* [not all] of the rate approval functions of the FPC were transferred to the FERC in subchapter IV, such administrative review to be exercised independently of the Secretary of Energy." Pet. at 10a-11a. Emphasis and bracketed phrase added.

3. Further, it is pertinent to note that the Government consistently overstates its case (*e.g.* the Question Presented does not mention the Flood Control Act) and shifts terminology (*e.g.*, "all rate-making authority" vs. "all Flood Control Act rate-making authority") to lull the Court into accepting, (1) that there is some general congressional intent since 1944 to give the FPC, and then the Secretary in 1977, unfettered power over rates, and (2) that all federal dams are involved in this dispute. Sam Rayburn urges the Court to note the frequent lack of citation in Government arguments, and to note especially that the Flood Control Act and DOE Act legislative histories selectively cited by the Government do not deal with the Section 5 restraint on rate implementation. In contrast, those legislative histories supplied by Sam Rayburn do deal with such restraint.

4. The Government's tactics make it necessary to state for the Court both what is, and what is not at issue. The following are not at issue:

1. The need for the Government to recover the power aspect of Corps of Engineers' construction, operation, maintenance, and replacement costs for certain dams through Flood Control Act rates has never been contested.
2. The amount of the rate increases involved in this and parallel litigations, such as *Sam Rayburn*, have never been contested.
3. The adequacy of the administrative rate-design and development process instituted by the Secretary has never been contested.

4. The FPC had, and the Secretary has been transferred the power to make Flood Control Act rates effective, and this has never been contested. And,
5. The availability of refunds for excessive collection of pre-final rates are not at issue, because the collection of pre-final rates is either illegal or legal of itself; legitimacy cannot be supplied by refunds.

The following are at issue:

1. Whether the Flood Control Act, Section 5 language precludes making proposed rates effective before they are finalized by confirmation and approval. And,
2. Whether the Flood Control Act was in any way amended by the DOE Act to remove the Section 5 preclusion of pre-final rate implementation, regardless of the bifurcation of the rate-making process.

Summary of Argument

Traditionally the Federal Power Commission (FPC) collected hydropower rates under Section 5 of the Flood Control Act of 1944 by making them effective through implementation upon completion of confirmation and approval as required by Section 5. The Secretary of Energy changed the traditional rate implementation procedure after December 21, 1978, by purporting to make Flood Control Act rates effective pending completion of agency confirmation and approval. The justification offered by the Secretary is that Section 5 requires rates to be designed to recover costs of dam construction and operation. U.S. Br. 6-7, 11, 13, 15, 18-20. But, Sam Rayburn notes that implementation of pre-final rates ignores the equally binding Section 5 requirement that there be agency confirmation and approval before a rate is implemented; "rate schedules *to become effective upon* confirmation and approval." 16 U.S.C. 825s. Emphasis added. "Confirmation and approval" is a clear statutory condition precedent to rate implementation

under Section 5,[3] and there has been neither administrative nor judicial explanation as to how DOE can shop among the requirements of Section 5 for those which it will ignore and those by which it will be bound. Notably, the effect of the Federal Circuit decision below correctly obliges DOE both to recover costs and to implement rates upon confirmation and approval as required in Section 5. Moreover, since final rates must recover all costs under the language of Section 5, it has never been explained by the Government why pre-final rates are "essential" to cost-recovery. U.S. Br. at 19.

A. *Background*

1. In 1977, Congress created the DOE in an effort to centralize energy policy-making, and to assure "coordinated and effective administration of Federal energy policy and programs." 42 U.S.C. 7111(4), 7112; U.S. Br. at 22. This does not touch upon the Section 5 substantive rate implementation requirement of completed confirmation and approval before rates become effective. Moreover, the FPC traditionally complied with that Section 5 rate implementation requirement (1944-1977), and the DOE Act "transfers" the exercise of that rate implementation requirement without amendment (42 U.S.C. 7191(a)(1)), (the Government alleges only four deviations from this practice in a 33-year period. U.S. Br. at 21-22). See *Sam Rayburn*, Am. Op. at A-10—A-13; and *Tex-La*, Am. Op. at A-50 (E.D. La.). Moreover, only the exercise of rate functions previously vested in the FPC under the provisions of some federal power-marketing statutes, including the Flood Control Act, Section 5,[4] are transferred to the Secretary while those functions under other statutes (Federal Power and Natural Gas

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[3] Typical of Government arguments throughout these litigations is the statement purportedly paraphrasing and partially quoting the language of Section 5 to the effect that rates "would 'become effective upon confirmation and approval.'" Pet. at 3. Again in the U.S. Brief at 3, 11-12, the Government plays with the language of Section 5 trying to avoid the plain meaning of the words enacted by Congress.

[4] Also, the Bonneville Project Act of 1937, Section 6, 16 U.S.C. 832e, and the Columbia River Transmission System Act of 1974, Section 9, 16 U.S.C. 838g. In

Acts) are transferred to the FERC. 42 U.S.C. 7151(b), 7171, 7172(a)).[5] See *Sam Rayburn*, Am. Op. at A-13—A-14; *Tex-La*, Am. Op. at A-51.

2. The Flood Control Act functions transferred to the Secretary are (1) rate confirmation and approval, (2) rate implementation (both formerly exercised by the FPC), and (3) rate-design (formerly exercised by the Secretary of the Interior (42 U.S.C. 7152)). But such transfer does not form a peculiar union of rate-design and rate confirmation and approval in the Secretary so as either to create new plenary rate-making power, or to eliminate Section 5's rate implementation requirements. *Sam Rayburn*, Am. Op. at A-6. On this point the *Tex-La* district court wrote, "The transfer of rate design and confirmation functions did not work, as plaintiff suggests, some sort of magic merger whereby the Secretary acquired the authority to impose interim rates." Am. Op. at A-55. Moreover, the DOE Act itself denies the Government's theory by directing the Secretary to exercise the rate-design function through the Administrators of the five regional Power Marketing Agencies (PMA's) (including SWPA) (42 U.S.C. 7152(a)(2)), thereby maintaining bifurcated exercise of the Section 5 FPC function (which the Government now admits, U.S. Br. at 13) (*Compare* Pet. at 11).

Further, contrary to the Government's argument that the Flood Control Act does not require confirmation and approval of pre-final rates, the act's plain language precludes implementation thereof.[6] *Central Lincoln People's Utility District* v. *Johnson*, 735 F.2d 1101, 1107 (9th Cir.); *Tex-La*, Pet. at 25a. U.S. Br. at 18. In contrast, FPC rate implementation under the Federal Power Act

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contrast, unlimited federal agency rate implementation authority without FPC review appears in the Reclamation Project Act of 1939, Section 9(c), 43 U.S.C. 485(c), and was not followed by Congress for the Flood Control Act in 1944.

[5] The Government conceded there was only a transfer. Gov't Br. below at 22-23; Pet. at 10-11; U.S. Br. at 3. Compare *Tex-La*, Pet. at 41a.

[6] Grammatical analysis of the phrase "the rate schedules to become effective upon confirmation and approval by the Federal Power Commission" demonstrates beyond question Congress' intent that "rate schedules" be implemented only upon completion of the confirmation and approval rate-making process. Thus, "to become" is a future infinitive passive voice, referring to implementation by the

of 1935, Section 205, 16 U.S.C. 824d, and the Natural Gas Act of 1938, Section 4, 15 U.S.C. 717c (transferred to the FERC), includes rate implementation procedures authorizing rates to be placed into effect upon filing and pending final agency action, unless suspended ("file and suspend mechanism").[7] Notably the Flood Control Act, Section 5, does not contain such authorization either as a substantive grant of power or as a rate implementation procedure. Rather, as the Government admits, the Federal Power Act "is totally different from the provision of the Flood Control Act governing rate changes." U.S. Reply Mem. at 3 n. 3. See also *Tex-La*, Am. Op. at A-39, A-50 (E.D. La.). *Compare* U.S. Br. at 17-18, 26.

3. Aware of administrative delay with FPC's confirmation and approval of proposed rates, and unable to obtain statutory language in the DOE Act authorizing pre-final rate implementation, the Secretary as a matter of policy decided to delegate (Delegation Order No. 0204-33, J.H. at 260)confirmation and approval authority to FERC while creating and delegating authority

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agent "Federal Power Commission." Further, "effective" is a predicate adjective which characterizes and refers back to the compound noun "rate schedule," and "upon" is a preposition governing the two objects "confirmation and approval" which are to be carried out by the agent "Federal Power Commission." Notably, "upon confirmation and approval" is an adverbial phrase which emphasizes the *time when* making a "rate schedule" "effective" is to be achieved. The future infinitive together with this adverbial phrase definitely states the condition precedent of confirmation and approval as the unqualified and completed future event, which thereby precludes "rate schedules" becoming "effective" before those objects of the preposition are accomplished. Therefore, as a basic matter of grammar, the FPC properly followed the plain statutory language and completed agency rulemaking before implementing rates under the Flood Control Act from 1944 through 1977. J. Bellafiore, *English Language Arts* 17, 146, 149 (Teacher's ed. 1971); *Patterns in English* 27-30, 171 (M. Lorraine ed., *et al.* 1964); *Practical Standard Dictionary* 1250 (Funk & Wagnalls 1941).

[7] *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654-657 (1978); *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583-585 (1942); *The New England Divisions Case*, 261 U.S. 184 (1923), all show pre-final rate implementation with appropriate statutory language (unlike Section 5) as either an unlimited plenary grant of authority or a rate implementation mechanism which is unlimited, as do the state court decisions cited in Pet. at 15 n. 15, and U.S. Br. at 25 n. 21. The Petition and Brief are misleading on this point.

to an assistant secretary to implement rates pending completion of confirmation and approval. Curiously, by giving confirmation and approval authority to the FERC the Secretary has preserved the administrative delay which he sought to avoid in effecting final rates. See *Tex-La*, Pet. at 34a-35a.

The fundamental legal problems with the Delegation Order are (1) that the Secretary has no independent authority to implement rates, he is limited to the authority set out in the particular power-marketing statute being applied,[8] so that there is no independent plenary rate-making power under the DOE Act or otherwise to support derivative "interim" rate implementation pending completion of confirmation and approval for Flood Control Act rates, (2) that the Flood Control Act, Section 5, specifically and substantively restricts the event of rate implementation by the condition precedent of completed confirmation and approval thereby precluding pre-final rate implementations, and (3) that the existence of merged, integrated, consolidated or separate rate-making functions does not bear on the completed confirmation and approval requirement of the Section 5 substantive rate implementation restriction.

B. *Issue-Related Litigations*

After initial implementation of pre-final rates by the Government in the spring of 1979, two unsuccessful refund suits were brought under the Bonneville Project Act of 1937, Section 6, 16 U.S.C. 832e.[9] *Montana Power Company* v. *Edwards*, J.A. at 402 (D. Ore. 1981); and *Pacific Power and Light Company* v. *Duncan*, 499 F.Supp. 672 (D. Ore. 1980).[10] Both suits were decided

[8] The Government conceded this point in its brief to the Fifth Circuit at p. 41 in *Tex-La*.

[9] The Bonneville Project Act (BPA), Section 6, served as the model for the Flood Control Act, Section 5. Conference Report, H.R. Rep. No. 2051, 78th Cong., 2nd Sess. 7 (1944). The BPA Conference Report, H.R. No. 1507, 75th Cong., 1st Sess. (Aug. 12, 1937), makes no change in the House Report which states clearly that rate schedules are subject to confirmation and approval before being made effective. H.R. Rep. No. 1090, 75th Cong., 1st Sess. 3 (1937).

[10] Compare Pet. at 9 where *Montana* and *Pacific Power* are misleadingly implied to support or be approved by the Fifth Circuit, which rejected them.

by the same judge upon the erroneous determination, and following the Government's line of argument, that the administrative powers given to the Secretary of Energy under the DOE Act, Section 402(a)(2), 42 U.S.C. 7172(a)(2), contain substantive pre-final rate implementation authority extended from the Natural Gas Act. No appeals were taken, but the flawed legal reasoning of these cases was later rejected even by the Fifth Circuit in *Tex-La*, Pet. at 63a-64a. See also *Sam Rayburn*, Am. Op. at A-23—A-24; and *Tex-La*, Am. Op. at A-54 (E.D. La.). *Contra* U.S. Br. at 25.

A third customer suit was brought for refund of pre-final rates implemented under the Reclamation Project Act of 1939, Section 9(c), 43 U.S.C. 485h(c), wherein the district court upheld the pre-final rate implementation. *Colorado River Energy Distributors Ass'n* v. *Lewis*, 516 F.Supp. 926 (D.D.C. 1981). Notably, unlike the Flood Control Act, no language in the Reclamation Project Act's unrestricted general grant of rate-making authority requires confirmation and approval before rates become effective. See *Sam Rayburn*, Am. Op. at A-26—A-28; and *Tex-La*, Am. Op. at A-56—A-58 (E.D. La.).

At about this same time, a fourth customer suit succeeded against the Government's illegal pre-final implementation of Flood Control Act rates. *Arkansas Power & Light Co.* v. *Schlesinger*, Civ. Act. No. 79-1263 (D.D.C. Oct. 20, 1980). The Government lost because the language in its power sales contract prevented pre-final rate implementations against the customer (as do the contracts in this case but with different language). However, the statutory issue of restrictions against pre-final rate implementation under the Flood Control Act was not decided.

In addition, the Government brought three unsuccessful litigations against electric cooperatives (including Sam Rayburn) in Texas and Louisiana to recover pre-final Flood Control Act rate increases which the cooperatives had refused to pay as illegally implemented (they continued to pay the final rate in place). In each case, the separate district court judges independently determined (1) that the Flood Control Act, Section 5, requires final agency ac-

tion before rates may be made effective, (2) that the DOE Act transfer of the FPC function under the Flood Control Act in no way removes the restriction on that function against pre-final rate implementation under Section 5, and (3) that the Oregon district court was in error in regard to substantive rate implementation authority being granted through the extension of administrative powers under the DOE Act. *United States* v. *Tex-La Electric Cooperative, Inc.*, Am. Op. at A-39 (E.D. La. 1981), *rev'd* Pet. at 24a (5th Cir. 1982); *United States* v. *Northeast Texas Electric Cooperative, Inc.*, Civ. Act. No. 81-604 (S.D. Texas Dec. 9, 1981), *rev'd* Pet. at 24a (5th Cir. 1982); and *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, Civ. Act. No. H-80-1781 (S.D. Texas, Memorandum of August 13, 1982) (Am. Op. at A-1), (Final Judgment Oct. 26, 1982) (Am. Op. at A-35), *revoked* (Order Feb. 15, 1983) (Am. Op. at A-37).

While the district court actions in *Tex-La*, *Northeast*, and *Sam Rayburn* were pending, four municipal customers also successfully sued the Government. *City of Fulton* v. *United States*, Pet. at 5a (Ct.Cl. 1982). Before the *Fulton* decision was issued, summary judgment had been entered against the Government's pre-final rate implementations by the district courts in *Tex-La* (E.D. La.) and *Northeast* (S.D. Tex.). And, the *Tex-La* district court decision was cited with approval by the Court of Claims in *Fulton*, Pet. at 17a. After *Fulton* was decided by the Court of Claims, summary judgment again was ruled against the Government by the district court in *Sam Rayburn*, Am. Op. at A-1, A-35. Unfortunately, the Fifth Circuit Court of Appeals subsequently reversed *Tex-La* and *Northeast*, consolidated on appeal, (*Tex-La*, Pet. at 24a) inaccurately finding both that the DOE Act amends the Flood Control Act, Section 5 (Pet. at 42a-43a), and that the *Fulton* court misread the DOE Act (Pet. at 30a). Rather, the Fifth Circuit, like the Government here, misread the Court of Claims. *Tex-La*, Pet. at 30a; U.S. Br. at 27; pp. 2-3 *supra*. Tex-La and Northeast did not seek a writ of certiorari.

Thereafter, upon motion by the Government, the district court in *Sam Rayburn* reluctantly revoked its judgment against the Government but in doing so noted its disagreement with the Fifth Circuit in *Tex-La* (Am. Op. at A-37). That is a strong statement from the district court which, together with the Federal Circuit's *Fulton* adoption of the so-revoked *Sam Rayburn* Memorandum, indicates the importance of the instant issue of statutory control of the DOE's administrative ambitions. Sam Rayburn took an appeal to the Fifth Circuit where the district court's second judgment was summarily affirmed relying on the Fifth Circuit's earlier decision in *Tex-La*. *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, 712 F.2d 144 (*per curiam* 1983). Sam Rayburn's petition for rehearing was denied on September 13, 1983. Subsequently Sam Rayburn filed an unsuccessful petition for a writ of certiorari. *Sam Rayburn Dam Electric Cooperative* v. *United States*, 464 U.S. __, 79 L.Ed. 230 (Jan. 23, 1984). Sam Rayburn filed a motion and Out-of-Time Petition for Rehearing based on the granting of certiorari in the instant case, which was denied. *Sam Rayburn Dam Electric Cooperative, Inc.* v. *United States*, No. 83-676 (S.Ct.), __ U.S. __ (Oct. 7, 1985), 54 L.W. 3228.

Subsequent to the denial of certiorari in *Sam Rayburn*, the Claims Court issued its unreported judgment of January 20, 1984, in *Fulton* v. *United States*, awarding damages to Fulton under the Court of Claims decision. Pet. at 19a. The Government took appeal to the Federal Circuit. But the Federal Circuit, in *Fulton* below, rejected the Government's arguments and noted its agreement with decisions against the Government (1) by the Court of Claims in *Fulton*, Pet. at 5a, which cites the *Tex-La* district court for authority (Pet. at 17a), and (2) by the district court in *Sam Rayburn*, which also favorably cites the *Tex-La* district court decision (Am. Op. at A-39). Am. Op. at A-12.

Argument

The 1944 Flood Control Act, Section 5, in plain language requires completion of confirmation and approval before a rate is made effective. The FPC made Section 5 rates effective by such final agency action from 1944 until 1977, which the Government admits. *Sam Rayburn*, Am. Op. at A-6. In 1977 the DOE Act transferred that FPC function to the Secretary of Energy who delegated it to the FERC. Notably the exercise of that function was simply transferred; the function was in no way amended either by the DOE Act or by congressional intent stated in its legislative history. *Sam Rayburn*, Am. Op. at A-6. Thus, the imposition of pre-final or "interim" Section 5 rates by the DOE is in contravention both of Section 5's ~~the~~ express unamended language, and of 33 years administrative practice. Therefore, the decision of the Federal Circuit below, adopting the reasoning of the district court in *Sam Rayburn*, should be affirmed.

I. The DOE Act Creates No New Rate Making Authority

A. *The DOE Act Transfer*

The DOE Act "transfers" to the Secretary of Energy "the function of the Federal Power Commission." 42 U.S.C. 7151(b). That "function" is defined and determined by the substantive provisions of the power statute so transferred; *e.g.*, the Flood Control Act, 16 U.S.C. 825s, the Bonneville Project Act, 16 U.S.C. 832(e), or the Columbia River Transmission System Act, 16 U.S.C. 838g. Notably, there is no DOE Act change or amendment to the FPC function under those statutes, merely of the entity exercising the function, and the legislative history confirms that no amendment is intended:

> The Conference substitute transfers to the Secretary all functions of the Federal Power Commission, except those transferred to or vested in the Federal Energy Regulatory Commission in Section 402 of the bill.[11]

[11] *See* Gov't Br. at 22-23. The "DOE Act Conference Report," H.R. Rep. No. 95-539, 95th Cong., 2d Sess. 65 (1977).

Contra U.S. Br. at 3. Moreover, as the Conference Report indicates, certain FPC functions are transferred directly to the FERC, while the remaining functions are transferred to the Secretary. 42 U.S.C. 7151. *Accord Tex-La*, Pet. at 30a, *Tex-La*, Am. Op. at A-53. Consequently, the Secretary holds authority to exercise less than the full FPC function and he does not have "all rate-setting authority" as the Government argues. U.S. Br. at 12, 21 n.16.

Even the Flood Control Act rate-design function, while transferred to the Secretary by DOE Act, Section 302(a)(1), is to be exercised by the PMA administrators, Section 302(a)(2). 42 U.S.C. 7152(a)(1), (2). Therefore, under the very terms of Section 301(b) the Secretary stands only partially in the shoes of the FPC, and like the FPC has no independent rate-making authority.[12]

B. *DOE Act Administrative Powers*

1. The administrative powers of the DOE Act, Section 402(a)(2), are extended to the Secretary by Section 301(b). Such powers do not contain substantive rate-making authority. *Sam Rayburn*, Am. Op. at A-22; *Tex-La*, Pet. at 63a. Thus, Section 301(b) enables the Secretary to "exercise any power described in" Section 402(a)(2) to the extent necessary "to the exercise of any function within his jurisdiction". The administrative powers described in Section 402(a)(2) are those of specifically designated

[12] On this point the *Sam Rayburn* district court wrote:

> Plaintiff [United States] in the present case recognizes that prior to the enactment of the DOE Act, the rates developed by the Secretary of the Interior did not become effective until they were confirmed and approved by the FPC. (Plaintiff's Memorandum at 6, May 12, 1981). But plaintiff contends that the relevant transfer provisions of the DOE Act somehow altered that procedure, that the DOE Act eliminated the original bifurcated process when it vested both rate establishment and approval authority in the Secretary of Energy. It is important to note that in each of the three provisions analyzed above the word "transferred" is consistently used. The verb transfer is defined "to convey or remove from one place, person, etc., to another; pass or hand over from one to another; to make over the possession or control of (as, to transfer a title to land); sell or give. Black's Law Dictionary 1669 (4th ed. 1968). Thus, the thing transferred is not changed, enlarged or altered. It is passed from one to another. Am. Op. at A-6."

sections of the 1938 Natural Gas Act and the 1935 Federal Power Act, which contain no substantive rate-making power. 42 U.S.C. 7172(a)(2). The intent of Congress in granting those administrative powers is explained in the DOE Act "Conference Report," H.R. Rep. No. 95-539, 95th Cong., 2d Sess. 76 (1977), as follows:[13]

> In carrying out functions transferred to him from the FPC, the Secretary as well as the Commission, may utilize the incidental power contained in the Federal Power Act or the Natural Gas Act. For example, the Secretary may invoke the authority of these acts to enforce functions carried out by him or to adopt accounting rules so long as they are limited to what is necessary in order to carry out those functions vested exclusively in the Secretary.

2. Similarly, the general administrative powers conferred by the DOE Act, Section 644, do not contain rate-making authority. Section 644 only authorizes promulgation of rules and regulations "necessary or appropriate to administer and manage the functions now or hereafter vested in him." 42 U.S.C. 7254. Patently this is not a grant to exercise expanded FPC functions. Indeed, the Secretary is enjoined under DOE Act, Section 501, to follow the procedural requirements set out in the statutes containing the transferred powers.[14] 42 U.S.C. 7191(a)(1).

C. *The Absence Of Merger*

The Government has offered its magic merger theory to support the DOE Act creation of unrestricted plenary rate-making power

[13] This Court in *FPC* v. *Natural Gas Pipeline*, 315 U.S. 575, 583, 585 (1942), clearly points out that such administrative powers have no meaning until used in conjunction with a substantive statutory provision. See also, *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 151-152 (1962). All the 1938 Natural Gas Act and 1935 Federal Power Act substantive provisions were transferred to the FERC, not to the Secretary. 42 U.S.C. 7151(b), 7172(a). Consequently, the Secretary may apply only such administrative sections to the unamended substantive provisions of the 1944 Flood Control Act, Section 5.

[14] The Government conceded in its brief on appeal in *Tex-La* (at p. 41) that rate-making is conducted by the Secretary under the terms of the particular statute being applied.

in the Secretary. U.S. Brief at 4, 25. Thus, the Government anticipates that the Court will not find pre-final rate implementation authority in the Flood Control Act. U.S. Br. at 4. Consequently, the merger theory is patently a backstop. Gov't Br. at 17-18. Notably this theory ignores two realities: (1) Only the exercise of FPC functions is transferred (see *Tex-La*, Pet. at 41a), which precludes merger of the substantive functions into a whole greater than the parts; and (2) the exercise of rate-design is not left with the Secretary (Section 301(b)) but instead is placed by the DOE Act (Section 302(a)(2)), in the Administrators of the PMA's. See *Tex-La*, Am. Op. at A-5. Moreover, it is not the separation of functions which denies pre-final rate implementation authority—it is precluded by the Section 5 substantive rate implementation requirement that rates be made effective "upon" confirmation and approval. *Sam Rayburn*, Am. Op. at A-6; *Tex-La*, Am. Op. at A-51, A-55; *compare* U.S. Brief at 4.

The district court in *Sam Rayburn* dealt with this as follows:

> Accordingly, this Court concludes that both functions were transferred to the Secretary of Energy and that the original bifurcated process established by Section 5 of the 1944 Act was not discarded or altered but was transferred *in toto* to the Secretary of Energy. That transfer created no power to establish and collect an increased amount for the sale of energy between the time the increase is proposed and the time it is approved. In short, there was no creation of power to implement an interim rate. Am. Op. at A-14.

Likewise the Court of Claims in *Fulton* wrote:

> The Government's first contention fails upon a close examination of section 7151(b). Of critical importance is the introductory clause to the subsection, which states, "[e]xcept as provided in subchapter IV of this chapter." Subchapter IV (42 U.S.C. §§ 7171-7177) creates the FERC as an independent regulatory commission within the Department of Energy. Significantly, many of the rate approval functions of

the FPC were transferred to the FERC in subchapter IV, such administrative review to be exercised *independently* of the Secretary of Energy. The first sentence of 42 U.S.C. § 7151(b), therefore, does not clearly provide a statutory basis for the Secretary of Energy's claimed authority to adopt an interim rate increase for SWPA customers. Pet. at 10a. Emphasis added in part.

II. The DOE Act Legislative History Shows Neither Amendment of the Flood Control Act Nor Creation of Plenary Rate-Making Power

1. As recognized by the district courts in *Sam Rayburn*, Am. Op. at A-15 – A-18, and *Tex-La*, Am. Op. at A-54, the DOE Act legislative history does not discuss either rate implementation or amendment of Flood Control Act substantive rate-making provisions. As quoted earlier (p. 12), that legislative history only once mentions transfer of the FPC functions. Certainly, if consolidation of policy was to include creation of new substantive rate-making powers, the legislative history would have noted so important a change, at least where it discusses the transfer of functions—and it does not.

The DOE Act legislative history, which even the Fifth Circuit says "states in plain language that the section 'transfers to the Secretary [of Energy] all functions of the Federal Power Commission, except those transferred to or vested in the Federal Power Commission' " (*Tex-La*, Pet. at 30a), has been confused intentionally by the Government to manufacture the basis for an amendment to the Flood Control Act. *Tex-La*, Pet. at 64a-65a; U.S. Br. at 3, 5-7, 23, 28. Thus, the Government's manipulation of the DOE Act legislative history uses the Fifth Circuit's confused *Tex-La* decision to argue now that Congress intended to amend the Flood Control Act to enable the Secretary to make rates effective pending, rather than upon, confirmation and approval. The *Tex-La* decision of the Fifth Circuit is discussed at pp. 23-26 *infra*.

2. The Fifth Circuit's action in rewriting the Flood Control and DOE Acts, in the face of clear language in both statutes, and

without supporting legislative history, transgresses against the rule enunciated by this Court to prevent judicial legislation. *Griffin* v. *Ocean Contractors*, 458 U.S. 564, 570-571 (1982); *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *FPC* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 514 (1949); *Beals* v. *Hale*, 45 U.S. (4 How.) 36, 53 (1846). Equally important, the result of the Fifth Circuit's action is to give judicial approval to the Secretary of Energy's administrative abrogation of the congressionally set requirement of the Flood Control Act, Section 5, for completion of confirmation and approval before rates are made effective.

III. The Flood Control Act Requires Completion of Confirmation and Approval Before Rate Implementation

A. *Section 5 Precludes Rates Being Implemented Before Confirmation and Approval is Completed*

1. The plain language of the Flood Control Act, Section 5, requires (1) that "rate schedules shall be drawn having regard to the recovery...of the cost of producing and transmitting such electric energy . . . ", and (2) "rate schedules *to become effective upon* confirmation and approval." 16 U.S.C. 825s. Emphasis added. Section 5 presents these neither as alternative requirements, nor as options for agency selection to accommodate administrative convenience (*contra* U.S. Br. at 26), especially when any inconvenience is the product of the agency's own rulemaking (U.S. Br. at 4-5, 7, 20). Therefore, confirmation and approval must be completed before rates are made effective.

2. Notably, the Government has not informed this Court that the Section 5 costs to be recovered must include not only the amortized amount of the capital investment, but also operations, maintenance, replacements, and marketing costs, which include the cost of borrowing from the Treasury while proposed rates are finalized. But the Government does admit the final rate must recover costs. U.S. Br. at 5. Therefore, awaiting final rates does not result in losses to the Government, nor in subsidies to the customers, and to suggest such losses or subsidies is a bald inten-

tional attempt to mislead. *Contra* U.S. Br. at 6-7, 11, 13, 15, 18-20. In addition, the Government has supplied no statutory basis for the Secretary to rewrite Section 5's requirements in his selection of "rate-setting techniques" (U.S. Br. at 17). And, the Government has not explained how pre-final rate implementation is economically or legally "essential" since Section 5 requires the final rate to recover costs. U.S. Br. at 19. Simply saying so repeatedly is not sufficient. Also, the Court is not informed that unrecovered costs must be carried forward with interest and recovered in the next rate.

3. Importantly, Section 5 rates were made effective pursuant to the FPC's final agency confirmation and approval action from 1944 through 1977, both as the Government concedes (Gov't Br. below at 19; *Sam Rayburn*, Am. Op. at A-6) and as the Fifth Circuit found (*Tex-La*, Pet. at 25a).[15] Throughout that 33-year period the administrative practice was that no rate was made *effective* before the FPC exercised final agency confirmation and approval action,[16] and no effort was made by the

[15] On only four occasions the FPC made a rate effective for a limited period of time either as pre-final or as final rates, ambiguously called "interims". The Court of Claims in *Fulton* examined these administrative decisions and wrote:

> In summary, our review of the history of administrative practice under the Flood Control Act, considered as a whole, does not support the Government's view of FPC rate confirmation and approval. Significantly, we are unable to discover a single instance in the period 1944-1977 in which FPC, pursuant to the Flood Control Act, approved on an *interim* a rate increase sought by the SWPA. Moreover, it was clearly the practice of the Secretary of the Interior, consistent with contractual requirements, to seek final confirmation and approval of rates by the FPC before making them effective. Pet. at 16a.

In regard to the same administrative decisions the district court in *Sam Rayburn* wrote:

> However, administrative construction does not control the court's decision as to the proper interpretation of the law, and where manifestly wrong or clearly erroneous it will not be followed but will be rejected." " " This Court finds the prior rulings by the FPC are indeed inconsistent with the statutory mandate of Section 5 of the Flood Control Act, and, further, this Court cannot "rubber-stamp" an affirmance of those decisions. Am. Op. at A-11.

[16] As the Government admits (U.S. Br. at 11, n.*), it is a settled matter of administrative law that consistent past agency practice in interpretation and application of a statute is to be given significant weight in interpreting the statute. *EPA* v. *Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980). But the Government fails to note that the FPC's practice in interpretation of the Flood Control Act, Section 5, establishes that agency confirmation and approval must be completed before rates become effective, a tradition which the Fifth Circuit in *Tex-La* acknowledged. Pet. at 25a. The DOE should not be allowed now to shift agency interpretation of statutory authority. *United States* v. *Alabama Great Southern Railway Co.*, 142 U.S. 615, 621 (1892).

This Court has regularly denied newly claimed statutory authority. *See, e.g., NLRB* v. *Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 289 (1974); *FPC* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 513-514 (1949); *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351-352 (1941); *and see Chapman* v. *El Paso Natural Gas Co.*, 204 F.2d 46, 51 (D.C. Cir. 1953).

Moreover, as the *Sam Rayburn* district court noted (Am. Op. at A-11), agency interpretations of statutes and regulations, regardless of "expertise", are denied when they are inconsistent with a statutory mandate, "plainly erroneous", or "clearly wrong or unreasonable". *NLRB* v. *Brown*, 380 U.S. 278, 290-292 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965).

[17] "Conference Report", H.R. Rep. No. 2051, 78th Cong., 2d Sess. 7 (1944).

[18] Bill No. 7642, 75th Cong., 1st Sess. (1937), was amended by the Senate with the effect that Section 5 became Sections 6 and 7 of the BPA. The Conference Report does not discuss rate implementation, but it does indicate that "No material changes were made in the House bill by the Senate amendment." "Conference Report", H.R. Rep. No. 1507, 75th Cong., 1st Sess. 1 (Aug. 12, 1937). Thus the House Report is controlling on the meaning of the phrase "Subject to the confirmation and approval of the Federal Power Commission". 16 U.S.C. 825s, 832e.

Secretary of the Interior, SWPA, to give effect to a proposed rate as a pre-final rate pending final rulemaking. *Tex-La*, Pet. at 27a.

B. *Congress Intended To Require Confirmation and Approval*

1. The legislative history of the Flood Control Act does not discuss the statutory language of Section 5 regarding confirmation and approval or rate implementation. *Sam Rayburn*, Am. Op. at A-15 – A-18; accord *Tex-La*, Pet. at 36a-40a. But, section 5 was based on the Bonneville Project Act, Section 6,[17] and the House Report accompanying the BPA as Bill H.R. 7642[18] reads in pertinent part as follows:

> Section 5 prescribes that the Administrator shall fix rates for surplus electric energy subject to the approval of the Federal Power Commission. If any rate schedule so submitted is not approved then the Federal Power Commission may revise

such schedules in conformity with standards prescribed by the act, *and so revised such schedules shall become effective*. "Navigation Facilities on the Columbia River", H.R. Rep. No. 1090, 75th Cong., 1st Sess. 3 (1937). Emphasis added.

In addition, the district court in *Sam Rayburn*, Am. Op. at A-16, notes the relevant BPA legislative history as follows:[19]

> The report from the Committee on Rivers and Harbors states in its specific analysis of sections of the bill that "[r]ate schedules and revisions thereof shall from time to time be prepared and *submitted* by the Administrator [the official in charge of transmission and distribution of the surplus energy] to the Federal Power Commission" and "such rate schedules shall become effective as approved by the Federal Power commission." [sic] H.R. REP. NO. 1090, 75th Cong., 1st Sess. 509 (1937). (Emphasis added). The word "submitted" is significant because it intimates that the rate schedule so proposed is not final but that it is being given to the FPC for its scrutiny.
>
> The Bonneville Project Act was amended in 1945, although the sections on rate schedules were not significantly changed, and the committee report states, "Sections 2 and 3 are technical amendments to authorize the Administrator to dispose of energy to other Federal agencies and to do so *at rates approved by the Federal Power Commission*." H.R. REP. NO. 777, 79th Cong., 1st Sess. 874 (1945). Emphasis added.

[19] The Bonneville Project Act has been replaced with Pacific Northwest Electric Power and Conservation Act of 1980 (PNEPCA), 16 U.S.C. 839e. PNEPCA gave the Secretary authority for one year to implement interim rates. 16 U.S.C. 839e(i)(6). Patently the Secretary did not already have the specifically granted authority. In addition, PNEPCA does not acknowledge or adopt the Secretary's interim rate procedures under the Delegation Order as the Government suggests. U.S. Br. at 30 n. 24. Thus, rates must be "established in accordance with sections. . .5 of the Flood Control Act of 1944." 16 U.S.C. 839e(a)(1). Thus, Congress in enacting PNEPCA could not have understood the Flood Control Act to contain authority to make rates effective for the interim pending their confirmation and approval. *Cf.* H.R. Rep. No. 96-976, 96th Cong., 2d Sess. 70 (May 15, 1980).

This same approach was followed by Congress as late as 1974 in the Columbia River Transmission System Act, Section 9, 16 U.S.C. 838g. There the congressional report states:

> The section preserves the existing requirement of law that rate schedules prepared by BPA must be approved by the Federal Power Commission before they become effective. H.R. Rep. No. 1375, 93rd Cong., 2nd Sess. (1974).

The foregoing legislative histories show that Congress contemplated and the FPC implemented rates formulated by final agency action only. The remarks of Rep. Whittington and Secretary Ickes concerning power-marketing at the time of the Flood Control Act's passage (U.S. Br. at 16-17), cannot be persuasive as to authority to implement pre-final rates because those remarks touch on neither the substantive rate-making power nor the Section 5 rate implementation requirement; power-marketing is not rate implementation. Notably, the Fifth Circuit rejected this Government argument. *Tex-La*, Pet. at 64a.

2. Comparison of Flood Control Act, Section 5, with the language of other statutes shows that Congress knows how to draft specific language authorizing pre-final rate implementations when such is its intent. See *e.g.* note 19 *supra*. Such comparison demonstrates that the Section 5 preclusion of pre-final rate implementation is not "artificial"[20], nor is it contrary to normal "industry practice" with disposition of Flood Control Act power. *Contra* U.S. Br. at 16, 17. Thus, under specific language in the 1935 Federal Power Act, 16 U.S.C. 824d, and the 1938 Natural Gas Act, 15 U.S.C. 717c, utilities may have their new rate schedules implemented by the FERC on a pre-final basis, subject to refund. Also, under the Natural Gas Act, 15 U.S.C. 717d, and the Federal Power Act, 16 U.S.C. 824e, the FERC may reduce excessive rates of utilities on a pre-final basis. In direct contrast, statutes such as the Flood Control Act, Section 5, which regulate Federal Power

[20] Congressional withholding of authority from statutes regulating federal agencies should be considered as being by design rather than by chance. *Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458-461 (1974), *rehearing denied* 415 U.S. 952 (1974); *FPC* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. at 514; *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. at 352.

Marketing Agencies and are based on the BPA, require confirmation and approval of a proposed federal hydropower rate before that rate becomes effective. See *Sam Rayburn*, Am. Op. at A-18 - A-21. *Contra* U.S. Br. at 17-18.

C. *Confirmation and Approval Requires Final Agency Action*

The Delegation Order arguments of the Government regarding "confirmation and approval" are too simplistic a contrivance to merit much attention. U.S. Br. 3,-4, 24. The Delegation Order purports (1) to authorize the Assistant Secretary to make rates effective for (2) the period pending their confirmation and approval by FERC. J.A. at 260. Plainly the implementing action "delegated" to the Assistant Secretary is less than the "confirmation and approval" required by Section 5 or there would be no point in delegating the final confirmation and approval to the FERC.[21] Further, since Section 5 mentions only one event of confirmation and approval, and specifies that it is "upon" the occurrence of this event (not pending such occurrence) that rates are to be made effective, it can only be that the event required is final agency confirmation and approval. Anything less than such completed confirmation and approval, or anything pending completion of such confirmation and approval, is only part of and not the entire event upon which Section 5 stipulates a rate will become effective. *Compare* U.S. Br. at 11-12, 15. *Tex-La*, Pet. at 25a; *compare Tex-La*, Pet. at 59a. What the Flood Control Act, Section 5, denies to the Secretary (pre-final rate implementation power) he cannot delegate to the Assistant Secretary or anyone else. *Tex-La*, Am. Op. at A-51 - A-52.[22]

[21] Administrative exhaustion of remedies is usually required before agency action is final. *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969). Thus, since the FERC's confirmation and approval should not be considered a worthless gesture, confirmation and approval within the meaning of Section 5 is not completed until the FERC has acted to exhaust the administrative remedies of entities aggrieved by the rate.

[22] The 1939 Reclamation Project Act, Section 9(c), 43 U.S.C. 485h(c), unlike the Flood Control Act, authorizes making rates effective without the condition

D. *Confirmation and Approval Denies Implied Authority*

The Government's arguments for inherent or implied power to implement pre-final rates have caused confusion because of the mistaken impression given that the FPC held "plenary authority over ratemaking." Indeed, the Fifth Circuit both accepted and rejected that argument. *Tex-La*, Pet. at 59a, 64a. However, the FPC had no independent rate-making or implementation authority. *Contra* U.S. Br. at 25. Rather, the FPC, in easily ascertainable fact, held no authority apart from those specific grants of power given to it by the particular power statute being applied. Thus, even the Fifth Circuit in *Tex-La* acknowledged, "The DOE Act actually says that its provisions were written in an effort to leave the then present law intact" and that Congress wanted substantive procedures to stand. Pet. at 40a-41a; *compare* Pet. at 48a-49a.

IV. *Tex-La* Was Erroneously Decided by the Fifth Circuit, and the Federal Circuit in *Fulton* Should Be Affirmed

1. The Fifth Circuit in *Tex-La* wrote that "we reject many of the Government's arguments and accept all of Tex-La's except one". *Tex-La*, Pet. at 25a. The Tex-La argument not accepted, and which the Government admitted, is that the DOE Act does not "materially change Section 5 of the Flood Control Act". Pet. at 25a n.2, 59a. The "change" uncovered by the Fifth Circuit was the amendment of Section 5 by the combining of Flood Control Act functions in the Secretary to eliminate "bifurcated" rate-making. *Tex-La*, Pet. at 59a, 64a-65a. But that change is based on an inaccurate premise; that bifurcated rate-making is the controlling issue—it is not. The issue is implementation of rates, not the powers to design and confirm rates.

precedent of confirmation and approval. Thus in *Colorado Energy Distributors Ass'n* v. *Lewis*, 516 F.Supp. 926, 930 (D.D.C. 1981), the district court noted that "section [9(c)] grants the Secretary complete power over ratemaking and provides sufficient authority to sustain the interim rate system first established by the delegation order."

In *Tex-La* the DOE Act amendment to the Flood Control Act was manufactured from an irrelevant DOE Act legislative history (Pet. at 45a-50a) and the general purpose sections of the act (Pet. at 41a-44a). Notably the amendment produced does not deal with, nor logically affect the Section 5 rate implementation restriction in dispute. *Tex-La*, Pet. at 48a, 64a-65a. Importantly, the DOE rate review procedure so staunchly defended by the Fifth Circuit had never been contested by either Tex-La or Sam Rayburn. *Tex-La*, Pet. at 34a-36a, 50a-51a, 54a-58a, 66a. But as regards the common issue with *Fulton*, whether proposed Flood Control Act rates could be made effective without completion of confirmation and approval, the Fifth Circuit erroneously found that Tex-La had conceded the issue. *Tex-La*, Pet. at 41a-42a, 59a. Indeed the Fifth Circuit never examined the Section 5 implementation requirements issue, and every reference in *Tex-La* to pre-final rate implementation is based on the inaccurate statement of Tex-La's concession. Pet. at 25a, 31a-32a, 34a, 41a-42a, 57a, 59a. More importantly, Sam Rayburn does not concede that issue.

2. The urgency of the Fifth Circuit's creation of an amendment to the Flood Control Act seems to arise from the argument of the Government that $800 million would be due in refunds of illegally collected rates should *Tex-La's* position be upheld. *Tex-La*, Pet. at 28a n.5. The Government made the same $800 million floodgates argument to the Federal Circuit below (Brief at p. 3 n.2), but curiously has reduced the amount in the instant proceeding to $500 million (Pet. at 21). Notably the Government impliedly acknowledges the speciousness of this floodgates argument by not mentioning it here in its brief on the merits. Moreover, that the Government would put forward such an inaccurate argument is outrageous and a patent effort to obtain judicial ratification of illegal rate implementations. Thus, the Government argument has no point unless the Court is convinced that the pre-final Flood Control Act rate implementations were illegal.

In addition, if the Government's illegal pre-final rate implementations have resulted in collections of $800 or even $500 million since 1977, there is every reason that persistence in such collection be curtailed rather than judicially condoned (thereby setting a precedent for future administrative excesses). Further, the Government is aware that any refund actions would be brought in the Claims Court and, evidently the Claims Court (or the Federal Circuit on appeal) considered such suits could be handled so as not to bankrupt the Flood Control Act power sales program. If there was any merit to the floodgates refund argument, the Government should have had success with the Federal Circuit below, and it did not.

Further, the Government has avoided telling courts that it has an equitable defense to any refund actions based on mutual mistake.[23] Thus, the Government and its customers have received value, and the Government has changed its position expending amounts collected without protest from such customers in the mistaken belief of both sides that such collections complied with law. G. Douthwaite, Attorney's Guide to Restitution 45-50 (1977); 13 Williston on Contracts 540-41 (W. Jaeger ed. 3d ed. 1970); 3 Corbin on Contracts 752, 757-59 (1960). Equitably no refunds are warranted under such circumstances, and even when pre-final rates are protested, the amount of any refund would be folded into the next rate implemented so that there may be little economic point to refund suits.[24] While the Government calls the mutual mistake defense "disingenuous," the Government has not denied that the defense is available to it.[25]

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[23] Equitable defenses may be raised in the Claims Court. *Cf. Pauley Petroleum, Inc.* v. *United States*, 591 F.2d 1308, 1315-16 (Ct. Cl. 1979). The defense of mutual mistake is available to the Government against a claim for restitution of monies paid. *1776 K Street Associates* v. *United States*, 602 F.2d 354, 357 (Ct. Cl. 1979).

[24] The amount of any refund would constitute an unrecovered cost under Section 5, and the SWPA would be entitled to immediately file a proposed rate amendment with the FERC for emergency implementation to recover the refund amount in a finalized rate increase. Notably the FERC will not confirm and approve a rate which does not recover costs—such proposed rate is remanded as was the instant rate increase when first proposed. *Tex-La*, Pet. at 34a-35a.

[25] Reply Mem. of U.S. at 5.

3. The specter of a refund "stampede" referred in *Tex-La* by the Fifth Circuit (Pet. at 28a n.5) and the Government (Pet. at 21) has not materialized over the past five years. Indeed there have been no refund actions filed, and Sam Rayburn is the only entity in a position to do so having protested the implementation of a pre-final rate against it effective June 16, through November 6, 1984.[28]

V. The Binding Effect of Power Sales Contracts

The settled legal principle is that the Government is bound to honor the commercial terms of its contracts. The commercial terms of the contracts in dispute should, therefore, be enforced to require that agency action be completed before rates are made effective. *Arkansas Power & Light Company* v. *Scheslinger*, Civ. Act. No. 79-1263 (D.D.C. Oct. 20, 1980); *Colorado River Energy Distributors*, 516 F.Supp. at 932. Further, to allow the Government to avoid the commercial terms of its contracts would violate the *Mobile-Sierra* doctrine which guided the Court of Claims in *Fulton*, Pet. at 13a-14a, and prohibits unilateral rate increases by utilities in derogation of express contractual terms. *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 340-341, 347 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).

[28] Final judgment was entered in *Tex-La*, Civ. Act. No. 80-2813 (E.D. La. Oct. 7, 1985), but final judgment has not been entered in *Northeast*, Civ. Act. No. H-81-604 (S.D. Tex.). Sam Rayburn's motion to file its Out-Of-Time Petition for Rehearing in *Sam Rayburn Dam Electric Cooperative, Inc.* v. *United States*, No. 83-676 (S. Ct.), 54 L.W. 3228, was denied on Oct. 7, 1985. The total amount at stake as potential refunds in these cases and the instant *Fulton* case was less than $5.2 million. If this is too much jeopardy for the Government, a prospective ruling could be entered. Further, Tex-La and Northeast have not protested subsequent pre-final rate increases, but Sam Rayburn protested a pre-final rate implementation in the summer of 1984 which in total amount is approximately $850,000. Since refund of any part of the principal reflected in these amounts would be folded into the next rate in addition to the SWPA's cost of borrowing, plus other rate components, there is little incentive to actually take a granted refund, but there is every reason to take a refund of the interest collected on the amounts withheld from payment of illegal rates to SWPA. Notably, the interest on monies borrowed by SWPA to cover withheld amounts in dispute is likely to appear in the next final rates regardless of the illegality of SWPA's rate implementation actions.

Conclusion

The Fifth Circuit and the Government have completely misunderstood the statutory language of the DOE Act and the Flood Control Act, Section 5. It is not the independent review of proposed rates which makes the Section 5 rate implementation authority restricted. Merger of rate-making functions, therefore, is immaterial to the substantive restriction on rate implementation; "rate schedules *to become effective upon* confirmation and approval." 16 U.S.C. 825s. Emphasis added. The Fifth Circuit and the Government have studiously avoided addressing the meaning and effect of that specific restrictive language. As a result, preference customers of Flood Control Act hydropower are faced with serial stacking of pre-final rates over long periods with only the oldest rates becoming from time to time judicially reviewable and effectively subject to refunds. To correct this situation will cause no great upset to the administrative process, because the Secretary may delegate *final* confirmation and approval authority to an Assistant Secretary with appropriate administrative safeguards as traditionally applied to federal hydropower rulemaking. Alternatively the DOE could be content with use of the FERC for final agency action.

For the foregoing reasons the judgment of the Federal Circuit in *City of Fulton* v. *United States*, should be affirmed.

Respectfully submitted,

Ralph J. Gillis
Robert D. Willis
Attorneys for Sam Rayburn Dam Electric Cooperative, Inc.

October 23, 1985

APPENDIX A

STATUTES INVOLVED

1. 1944 Flood Control Act

Section 5 of the 1944 Flood Control Act, 16 U.S.C. 825s, provides, in pertinent part, as follows:

> Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years.

2. 1977 DOE Act

a. Section 301 of the 1977 Department of Energy Organization Act, 42 U.S.C. 7151(b), provides, in pertinent part, as follows:

> Except as provided in subchapter IV of this chapter, there are hereby transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 402(a)(2) of this title to the extent the Secretary deter-

mines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence.

b. Section 302 of the 1977 Department of Energy Organization Act, 42 U.S.C. 7152(a)(1), provides, in pertinent part, as follows:

> There are hereby transferred to, and vested in, the Secretary all functions of the Secretary of the Interior under section 825s of Title 16, and all other functions of the Secretary of the Interior, and officers and components of the Department of the Interior, with respect to—
>
> • • •
>
> (B) The Southwestern Power Administration;
>
> • • •

c. Section 402(a)(2) of the 1977 Department of Energy Organization Act, 42 U.S.C. 7172(a)(2), provides, in pertinent part, as follows:

> The Commission may exercise any power under the following sections to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission:
>
> (A) sections 4, 301, 302, 306 through 309 and 312 through 316 of the Federal Power Act; and
>
> (B) sections 8, 9, 13 through 17, 20, and 21 of the Natural Gas Act.

3. 1939 Reclamation Act

The 1939 Reclamation Act, Section 9(c), in pertinent part, reads as follows:

> Any sale of electrical power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such

> periods, not to exceed forty years, at such rates as in his judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper. . . . 43 U.S.C. 485h(c).

4. 1982 Pacific Northwest Act (PNEPCA)

Section 839e(a)(1) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839, *et seq.*, provides in pertinent part, as follows:

> The Administrator shall establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. Such rates shall be established and, as appropriate, revised to cover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (including irrigation costs required to be paid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to this chapter and other provisions of law. Such rates shall be established in accordance with section 9 and 10 of the Federal Columbia River Transmission System Act, section 5 of the Flood Control Act of 1944, and the provisions of this chapter.
>
> (2) Rates established under this section shall become effective only, except in the case of interim rules as provided in subsection (i)(6) of this section, upon confirmation and approval by the Federal Energy Regulatory Commission. . . .
>
> • • •

(i)(6) The final decision of the Administrator shall become effective on confirmation and approval of such rates by the Federal Energy Regulatory Commission pursuant to section (a)(2) of this section. The Commission shall have the authority, in accordance with such procedures, if any, as the Commission shall promptly establish and make effective within one year after December 5, 1980, to approve the final rate submitted by the Administrator on an interim basis, pending the Commission's final decision in accordance with such subsection. Pending the establishment of such procedures by the Commission, if such procedures are required, the Secretary is authorized to approve such interim rates during such one-year period in accordance with the applicable procedures followed by the Secretary prior to December 5, 1980. Such interim rates, at the discretion of the Secretary, shall continue in effect until July 1, 1982.